IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 223

JESSE JAMES GILBERT,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S BRIEF

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Opinions Below

The opinion of the Supreme Court of the State of California was rendered December 15, 1965, and is reported at 63 Cal. 2d 690, 47 Cal. Rptr. 909 (1965).

Grounds Upon Which Jurisdiction Is Invoked

The judgment sought to be reviewed is dated December 15, 1965, and was rendered on that date. Petition for rehearing was denied on February 11, 1966.

The statutory provisions conferring on this Court jurisdiction to review by Writ of Certiorari the judgment in question is Title 28 United States Code section 1257 (3).

Questions Presented

1. Whether a criminal conviction can be sustained under the Fourteenth Amendment to the United States Constitution when the co-defendant's illegally obtained out-of-court statements depicting petitioner as a murderer, robber, and kidnapper, were presented to the jury?

2. Whether a criminal conviction can be sustained under the Sixth and Fourteenth Amendments to the Federal Constitution when petitioner was, subsequent to indictment and arraignment and the appointment of counsel, forced to participate in a police showup wherein the case against him was perfected?

3. Whether petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights when he was, without appropriate admonitions as to his constitutional rights to counsel and silence, requested and did furnish incriminating handwriting exemplars which cinched the case against him?

4. Whether a conviction based in large part upon the illegally seized evidence in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution can stand?

History of the Case

On March 10, 1964, a Los Angeles County Grand Jury returned a seven count indictment against petitioner (hereinafter "Gilbert") and co-defendant King, charging that on January 3, 1964, each of them violated Penal Code section

187 (Counts I and II), Penal Code section 211 (Count III), and Penal Code section 209 (Counts IV, V, VI and VII, C.T. 1-8).[1]

The case came on for jury trial June 8, 1964, in Department "A" (later changed to "C") of the Northeast District (Pasadena), of the Superior Court of California, in Los Angeles County, Honorable H. Burton Noble, Judge presiding (R.V.D. 1, 22, C.T. 19-20).

The trial of the guilt issue concluded on July 16th, and on July 17th, the jury returned a verdict of guilty against Gilbert and co-defendant King on all seven counts (C.T. 48, 144-146, 156, 164).

A bifurcated penalty trial was had before the same jury on July 21, 1964, and the cause was submitted to the jury on July 28th (C.T. 165-170). On July 29th, the jury returned its verdict recommending the death penalty for Gilbert on both Counts I and II, and life imprisonment for co-defendant King (C.T. 201-203).

The Supreme Court of the State of California affirmed Counts I, III, IV, V, VI and VII as to Gilbert, reversing Count II, the second murder conviction, while reversing co-defendant King's conviction in its entirety (see, A-21).

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[1] "C.T." is reference to the Clerk's Transcript, one volume. "R" is reference to the Reporter's Transcript, volumes thru

Grand Jury transcript, one volume.

"R.V.D." is reference to the Reporter's Voir Dire, volumes thru

Each of the above mentioned volumes is attached hereto as part of the records of this case.

Statement of Facts

On January 3, 1964, the Mutual Savings & Loan Association of Alhambra, California (hereinafter "the association") was robbed by two armed men about 10:45 a.m. (R. 315). In fleeing the premises, one of the robbers shot and killed Sergeant George Davis of the Alhambra Police Department (R. 531-539).

Meanwhile, Officer Nixon appeared. He fired one shot at the fleeing robbers, striking the larger of the men in the back (hereinafter "Weaver"). The wounded Weaver was captured a few blocks from the association by Nixon and taken to the Los Angeles County Hospital where he died later that night (R. 1086). Before he died, Weaver was interrogated by F.B.I. agent Norton. Weaver admitted being a participant in the association robbery and said that a person known to him as "Skinny" Gilbert was his accomplice. This was not a dying declaration (R. 1226-1227).

Weaver told agent Norton that Gilbert lived in Apartment 28 of a Hawaiian sounding named apartment house on Los Feliz Boulevard (R. 1221). Norton in turn gave the information to F.B.I. headquarters.

In the field, agent Keil was dispatched by radio to locate the apartment house. He located a similar building about 1:00 p.m., the "Lanai" (R. 1173-1174) and informed radio control (R. 1189-1190); Keil then entered the courtyard of the Lanai where he engaged the Manager, Mrs. Smith, in conversation. While Keil was speaking to Mrs. Smith, a tenant came over and gave her a key, saying that he was going to San Francisco to be back Tuesday (R. 1135-1137). When Keil learned from the manager that the resident of Apartment 28 was the person who had just turned

in his key and left by the rear exit, he ran out into the alleyway but saw no one (R. 1150).

About 1:30 p.m., agents Schlatter and Onsgaard appeared. Keil told them the resident of Apartment 28 was a Robert Flood who had just left (R. 1178).

The officers were without a search or arrest warrant (R. 1261-1262), and they did not have a photograph of the person accused by Weaver (R. 1265). Agent Schlatter's sole conversation with the manager was to obtain a key to Apartment 28 (R. 1278).

Agent Schlatter said the entry was in the nature of a raid and there was no reason to announce his purpose or authority (R. 1250).

The apartment was unoccupied (R. 1271). Once inside, the agents conducted a search (R. 1301 et seq.).[1] In the course of search, agent Crowley noticed an envelope on a dresser. Opening the envelope, he found four photographs of Gilbert (R. 1301-1303).

The photographs were removed without a warrant (R. 1192-1195, 1303). They were taken to the association by agent Keil where they were blown up by polaroid process and shown to eyewitnesses to the robbery (R. 1287 et seq.). They were introduced into evidence at trial (R. 1437, 2333, Exhibits 46 and 46-A); the photographs were also used before the grand jury (R. 2328).

At trial and upon appellate review, Gilbert made objection to the introduction of the photographs and the fruits

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[1] See, Appendix "B" for a list of evidence turned up in the January 3 search that was subsequently seized pursuant to warrants that issued January 3 and 5, 1964.

thereof, and other items of physical evidence upon the ground that it was unlawfully seized, or was the fruit of an unlawful search and seizure (R. 1147 et seq.), followed by motions to suppress said evidence upon constitutional grounds (R. 1385-1386) with said motions denied by the courts below (R. 1408; A-13).

Gilbert was arrested by the F.B.I. at Philadelphia, Pennsylvania on February 26, 1964 (R. 1548-1549). The indictment in the case at bar was returned on March 10, 1964 (C.T. 1-8). On March 26, after counsel had been appointed and after he had pleaded not guilty to the charges, Gilbert was taken to a police line-up where witnesses to the association robbery were called upon to identify him (e.g., R. 2197-2198).

Defense motions to strike and suppress the identification testimony of such witnesses were denied (R. 189; 196).

The courts below allowed in evidence, over defense objections, handwriting exemplars taken from Gilbert after his arrest by the F.B.I. (R. 1852). The courts below concede that Gilbert had demanded the presence of counsel prior to making the handwriting exemplars (R. 1846; A-15) but refuse to suppress on the ground that Gilbert waived the right to counsel (R. 1852; A-16).

Summary of Argument

1. Petitioner was denied due process of law when the declarant-co-defendant's illegally obtained confession was presented to the jury. That statement depicted Gilbert as a murderer, robber and kidnapper. *Jackson* v. *Denno*, 378 U. S. 368 (1964).

2. Petitioner was denied his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution when he was, subsequent to indictment and arraignment and the appointment of counsel, forced to participate in a police showup wherein the case against him was perfected. *Massiah* v. *United States*, 377 U. S. 201 (1964).

3. Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights when he was, without appropriate admonitions as to his Constitutional rights to counsel and silence, requested to and did furnish incriminating handwriting exemplars which cinched the case against him. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

4. Petitioner was convicted based upon evidence directly attributable to an illegal search and seizure of his apartment under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. *Stoner* v. *California*, 376 U. S. 483 (1964).

I.

Petitioner was deprived of the due process of law under the Fifth and Fourteenth Amendments of the United States Constitution when the trial court permitted the jury to hear the out-of-court declarations of co-defendant King which extensively recited petitioner's participation in murder, robbery and kidnaping.

During the trial the prosecution called Officer Bennett to the stand. He recited co-defendant King's extrajudicial confession before the jury (R. 1951 et seq.). The officer made reference to Gilbert 159 times (R. 1951, 1962, 1969, 1971, 1974, 1995, 2001, 2006, 2008, 2014-2015, 201 , 2031-2034, Vol. 14). Officer Bennett testified:

> "Gilbert further told King that as the officer had gone out the door, being backed up, that Gilbert had just gotten out of the door also when he fired one shot, hitting the officer in the head, and the officer fell to the pavement. . . ." (R. 1954).

Gilbert rested his case upon the People's evidence. The California Supreme Court held that the out-of-court statements of co-defendant King (which implicated Gilbert) should not have been admitted even as to King because they violated the *Massiah-Escobedo rule,* 63 Cal. 2d 690, (1965) but finding insufficient prejudice, it affirmed the decision.

There is no question but that King's statements were obtained in violation of the rules formulated by this Court in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). The statements were made while he was in custody and the investigation had focused upon him concerning the known crimes

of robbery and murder. 63 Cal. 2d at 699. Moreover, no statement of his Constitutional rights was furnished. And appropriate admonitions cannot be presumed from a silent (63 Cal. 2d at 699) record. *California* v. *Stewart*, 86 S. Ct. 1602, 1640 (1966).

The Supreme Court of California ruled as a matter of state law that the vague testimony which King gave at trial was induced by his improperly introduced extrajudicial confession. It stated:

> "There is also no merit in the contention that the erroneous admission of King's statements was not prejudicial to him because he took the stand and testified to committing the same acts that he had admitted in his statements. When King testified, the only evidence other than his statements that had been introduced to connect him with the crime was a fingerprint identified as his on a shopping bag similar to the one that had been used in the robbery. Since the details of his volunteered statements during booking are not in evidence, it is impossible to determine whether detailed evidence of those statements alone would have impelled his testimony. The detailed inadmissible statements including admissions of guilty knowledge, clearly left King no choice but to take the stand and attempt to exculpate himself by testifying that he did not know that Gilbert and Weaver intended to commit a robbery. Thus, King's testimony cannot be segregated from his erroneously admitted statements to sustain the judgment . . ." at page 701.

Certainly, King was not required to invoke a childish ostrichlike refusal to face facts and with unreasoning per-

tinacity bury his head in the sand in protest and suffer inevitable conviction, but was permitted to employ all available legal tactical means to assuage the injuries inflicted, including taking the stand. Cf. *United States* v. *Ballard*, 322 U. S. 78, 84-5 (1944).

Furthermore, the Court admitted that King's testimony was less damaging than his extrajudicial statements. 63 Cal. 2d at 702.

At any rate, California's highest court has held that the in-court statements were induced by the illegally obtained out-of-court statements and the ruling does not present a federal question.

It has long been the law that if evidence is illegally acquired from one party and is introduced in a jury trial where it implicates another co-defendant as well, reversal is imperative. *McDonald* v. *United States*, 335 U. S. 451 (1948); *Nelson* v. *United States*, 208 F. 2d 505 (1953).

When one co-defendant implicates the other in a full scale confession of his associate's misdeeds and the jury is allowed to hear the police officer's narration of the confession, the gravest kind of error is committed and the conviction is invalidated. *People* v. *Aranda*, 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P. 2d 265 (1965); *Anderson* v. *United States*, 318 U. S. 350, 356-57 (1943).

In this case, the jury was instructed to limit King's out-of-court confession to King alone and not consider it as to Gilbert. Needless to say this was like asking a jury to unring a bell. In *Jackson* v. *Denno*, 378 U. S. 368 (1964), this Court reversed a conviction because the defendant was constitutionally entitled to have the trial judge or another judge or another jury rule on the question of the voluntari-

ness of a confession before it was put to the jury. The Court concluded that the jury although it was expressly told that the confession should be ignored unless found to be voluntary most probably could not separate the question of voluntariness from its truth.

> "If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?" At pp. 388-89.

The court also relied upon Mr. Justice Frankfurter's forceful dissent in *Delli Paoli* v. *United States*, 352 U. S. 232 (1957):

> "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." At p. 248.

Although it has been suggested that reversals in this kind of situation are predicated upon the assumption that the jury cannot effectively disregard the evidence which they have heard, although told to do so, and that such an approach belittles the jury system, we think the appropriate answer was provided by Mr. Justice Frankfurter in a coerced confession case, *Watts* v. *Indiana*, 338 U. S. 49, 52, wherein he stated:

> "(T)here comes a point where this court should not be ignorant as judges of what we know as men." Cf. *Sheppard* v. *Maxwell*, 86 S. Ct. 1567 (1966).

As Mr. Justice Jackson stated in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), a case where extrajudicial statements were introduced against a co-conspirator who didn't make them:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . . all practicing lawyers know to be unmitigated fiction." At p. 453.

The court in *Jackson* v. *Denno, supra,* also feared the specter of the "compromise verdict."

In *People* v. *Aranda*, 63 Cal. 2d 518 (1965), the California Supreme Court was confronted with a situation exactly like Gilbert wherein a confession of one co-defendant had been extracted in violation of the *Escobedo* decision and introduced in a jury trial with the limiting instruction that it be used only against the declarant. The Court concluded that irrevocable prejudice to the co-defendant had been committed. In interpreting *Jackson* v. *Denno, supra,* the Court remarked:

> "Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a co-defendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

"Indeed the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any co-defendants of the declarant. A jury cannot segregate evidence into separate intellectual boxes. It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." At pp. 528-29.

The *Aranda* court concluded that "At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant." At page 526.

Due to the grave doubts the Court entertained that joint trials could now be permitted when the confession of one co-defendant implicates another, the Court adopted a three prong test which must be followed in these situations:

"(1) It can permit a joint trial if all parts of the extrajudicial statements implicating any co-defendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of co-defendants but any statements that could be employed against non-declarant co-defendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a co-defendant, the trial court must exclude it if effective deletions are not possible. At page 531. Cf. *Delli Paoli* v. *United States*, 229 F. 2d 319, 322 (1956) (dissenting opinion of Frank, J.).

Petitioner urges that the use of illegally obtained evidence against him violated due process of law. Secondly, that irrespective of whether the statements were illegally obtained, the jury could not ignore the devastating impact of his co-defendant's out-of-court confession implicating him. Hence his due process rights were likewise violated.

Finally, he asserts that if the illegally obtained statements would invalidate any evidence recovered as a result of said statements under the "poisoned fruit" doctrine, *Wong Sun* v. *United States*, 371 U. S. 471 (1963), it stands to reason that his conviction is equally poisoned fruit.

II.

Petitioner after being indicted by a California grand jury for murder, robbery and kidnaping was appointed a lawyer by the court and entered pleas of not guilty to all charges. Thereafter, he was compelled to then participate in a "showup" at which the prosecution cemented its case against him. The "showup" was conducted without prior notice to either petitioner or his attorney of record and his attorney was not afforded an opportunity to be present nor make objections to the proceeding. This activity was in clear contravention of the Sixth and Fourteenth Amendments to the United States Constitution.

After the indictment had been returned charging petitioner with the crimes of murder, robbery and kidnaping arising from an officer-killing during an escape from the scene of an Alhambra Savings and Loan Association robbery, Gilbert was arraigned and pled not guilty to all charges. Counsel was appointed for him prior to arraignment and plea. Since first degree murder was not a bailable offense he remained within the confines of the Los Angeles County jail. On March 26, 1963, eight days after his arraignment and the appointment of counsel, Gilbert was suddenly and without notice to himself or his counsel compelled to take part in a police directed "showup." This "showup" is only sketchily described in the record, but it is clear that the identification case against Gilbert was made at the lineup. The police officials sought no court order for Gilbert's participation which was an indisputed requirement under California Penal Code section 4004.

During the trial of the guilt issue, four identification witnesses, including Gilbert's landlady, Mrs. Bette Wilner, testified that they had appeared at such "showup." Defense motions to strike and suppress the identification testimony

of all four witnesses were denied (R. 189-196). Cf. *Stoner* v. *California,* 376 U. S. 483 (1964); *People* v. *Stoner,* 241 ACA 814, 50 Cal. Rptr. 712 (1966). During the penalty phase of the proceedings, evidence was offered to the effect that Gilbert had committed five other robberies prior to the commission of the Alhambra robbery. Eight witnesses from the several banks involved identified Gilbert as one of the bank robbers. All eight attended the aforementioned police showup (R. 3376, 3378, 3410, 3449, 3450, 3472, 3509, 3510, 3549, 3550, 3744, 3745, 3757). Defense motions to suppress respective identification testimonies were denied (R. 3697, 3698).

A. Petitioner's Sixth Amendment Rights, Whether Viewed as Directly Applicable to the States or Incorporated in the Fourteenth Amendment Due Process Clause and Thereby Transmitted to the States, Were Violated.

Ever since *Powell* v. *Alabama,* 287 U. S. 45 (1932), it has been recognized with little dispute that the right to counsel from the onset of criminal *judicial* proceedings to their termination was an absolute requirement for a fair trial. In fact, this Court has held that a violation of this sacred guarantee renders void the remainder of proceedings. In *Johnson* v. *Zerbst,* 304 U. S. 458, 467 (1938), a classic Sixth Amendment case, this Court declared:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."

That the presence of counsel from arraignment to judgment is a jurisdictional *sine qua non* to a valid conviction

in a state court as well follows ineluctably from a host of recently decided cases. *Gideon* v. *Wainwright,* 372 U. S. 335, 336-37, 342-5 (1963); *Douglas* v. *California,* 372 U. S. 353, 354-58 (1963); *White* v. *Maryland,* 373 U. S. 59, 59-60 (1963); *Hamilton* v. *Alabama,* 368 U. S. 52, 54-55 (1961).

Hamilton v. *Alabama, supra,* invalidated a death penalty murder conviction because the defendant was without counsel at the arraignment. In counsel's absence the defendant merely pleaded not guilty. The Court noting the critical need for counsel at *all* stages of the proceedings, including arraignment, reversed the conviction.

As far back as *Powell* v. *Alabama, supra,* when the right to counsel rule was in its embryonic stage of development, this Court noted:

> "... during perhaps the most critical period of the proceeding ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation (are) vitally important, the defendants ... (are) as much entitled to said aid (of counsel) during that period as at the trial itself." 287 U. S. at 57.

In *White* v. *Alabama,* 363 U. S. 59, 59-60, (1963), this Court held that a plea of guilty obtained at the preliminary hearing in the absence of counsel could not be utilized against the defendant in a later trial after the plea had been withdrawn. The Court reversed stating:

> "Although petitioner did not object to the introduction of this evidence at the trial ... the rationale of *Hamilton* v. *Alabama, supra,* does not rest, as we shall see, on a showing of prejudice." 363 U. S. at 61.

Cf. *Pointer* v. *Texas,* 380 U. S. 400 (1965).

The obvious reason for insistance on strict compliance with Constitutional requirements in Right to Counsel cases is the simplicity of the task, the recognition that "the degree of prejudice can never be known," *Hamilton* v. *State of Alabama, supra,* at 159, and the cumbersome prospect which *ad hoc* determinations invariably portend. While the question of when the right to counsel attaches is fraught with considerable difficulty in a pre-trial context, the inauguration of judicial proceedings marks a clear cut departure from the investigatorial to the accusatorial phase of a lawsuit. Once having crossed the Jordan, counsel must walk hand in hand with the defendant the rest of the way.

In *Spano* v. *New York,* 360 U. S. 315 (1959), this Court reversed a state criminal conviction for murder because a confession had been extracted from the accused in violation of the due process clause. However, four members of the Court, while concurring in the conclusion that the confession was coerced, "pointed out that the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. It was pointed out that under our system of justice, the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.'" *Massiah* v. *United States,* 377 U. S. at 204.

A fair trial demands that once judicial proceedings have commenced, they may not be summarily adjourned and the accused conscripted at the sole behest of the police, and without notice to the Court or counsel, to play his role in the manufacturing of evidence against himself.

Mr. Justice Douglas in his concurring opinion in *Spano, supra,* had this to add:

> "We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice . . . But here we deal not with a suspect but with a man who has been formally charged with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied. This is a capital case; and under the rule of *Powell* v. *State of Alabama* . . . the defendant was entitled to be represented by counsel. This representation by counsel is not restricted to the trial.
>
> ". . . Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself . . .
>
> ". . . This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel." 360 U. S. at 325.

In *Massiah* v. *United States,* 377 U. S. 204 (1964), the Court clearly and unequivocally obliterated any distinction between judicial and extra-judicial action by the police once the "criminal prosecution has begun." *Stovall* v. *Denno,* 355 F. 2d 731 (1966) (dissenting opinion of Justice

Friendly); in accord, see *Wade* v. *United States*, 358 F. 2d 557 (1966).

Justice Stewart speaking for the majority in *Massiah* declared:

> "it was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extra judicial proceeding. Anything less, it was said, might deny a defendant's effective representation by counsel at the only stage when legal aid and advice would help him." 377 U. S. at 204.

In *Massiah*, as here, we ask nothing more than that after the judicial proceedings have commenced and counsel is either retained or appointed, it makes no difference, *Miranda* v. *Arizona*, 80 S. Ct. 1602, 1612, 1630 (1966), the Government should be forbidden to utilize the defendant to gather evidence against himself in the absence of counsel.

In two recent decisions the Federal Circuit Courts have proffered conflicting views of the right to counsel requirement at a post-arraignment "lineup" or "showup."

In *Stovall* v. *Denno*, 355 F. 2d 731 (1966), the majority of the Judges for the Second Circuit Court of Appeals held that counsel was not required in a context wherein a defendant, after arraignment in a New York State court for murder, was granted a six day continuance to obtain an attorney of his choosing and before he did so was escorted to the hospital room of the victim's wife and identified. The Court first held that identification evidence did not violate the privilege against self-incrimination and

that only testimonial evidence rather than "an exclusion of his body as evidence" is encompassed by that right. The Court next held that due process of law was not violated which is not important at this juncture. Finally, the Court held that inasmuch as the defendant made no incriminating statements, there was no deprivation of his right to counsel. "Counsel could not have altered the course of events as to identification" and the defendant gave no other evidence which could have been precluded by timely advice from counsel. Cf. *Schmerber* v. *California,* 86 S. Ct. 1826, 1833 (1966).

The *dissent* pointed up by illustration the basic fallacy underlying the majority opinion which coincidentally is the crux of the entire case of *Gilbert* v. *California.*

> "The panel recognized that 'the privilege (of the Fifth Amendment against self-incrimination) does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon * * *. and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles.' But this truism does not settle whether Stovall was deprived of his Sixth Amendment right to counsel; although the two rights often overlap, they are not congruent. No one would suppose, for example, that because the Fifth Amendment does not protect a defendant from being compelled to stand up in court and try on a garment found at the scene of the crime, the prosecutor could require defense counsel to absent himself during such an episode." 355 F. 2d at page 743.

Justice Friendly in a footnote goes further in the destruction of the position that the *sole* function of counsel is to safeguard the defendant's privilege against self-incrimination. He opined:

> "Once it has been held, as these cases clearly did, (*Massiah, Hamilton* and *White*) that the Sixth Amendment may apply outside the courtroom and when, as in Massiah, the accused did not even know of the presence of the police or the prosecutor, I see no escape from the conclusion that, if the right has attached, the accused is entitled to the assistance of counsel when the prosecutor attempts to use him as a means of procuring evidence to be offered at the trial. I cannot believe my brothers would go to the extent of saying that, after arraignment or indictment, *counsel could* be excluded while the defendant was being subjected to medical examination or blood or handwriting tests. If counsel cannot be excluded from such procedures, common sense does not supply me with a satisfactory answer why he can be barred from an identification—which his client is compelled to attend—although no one would dream of excluding him from a less meaningful one in the courtroom; the argument that although excluded from the former, he will have an opportunity to attack both identifications at trial, does not seem sufficient for preventing him from rendering all possible assistance to the accused before the witness' impression hardens. I fear that my brothers simply have not been able to adjust their sights to the Supreme Court's new concept that the right to the assistance of counsel embraces activities outside the courtroom." 355 F. 2d at page 743.

People v. *Gilbert,* 63 Cal. 2d 690, 47 Cal. Rptr. 909 (1965) erroneously viewed the post-indictment and arraignment lineup as simply a Fifth Amendment problem. In *Schmerber* v. *California,* 86 S. Ct. 1826, 1833 (1966), the Fifth Amendment theme again predominates. However, since the situation is pre-indictment, the Sixth Amendment question was largely passed over. In *Miranda* v. *Arizona,* 86 S. Ct. 1602 (1966), there again appears too much Fifth Amendment emphasis (Harlan, J. dissenting) at pp. 1646, 1647.

In *Wade* v. *United States* (5th Cir. 1966), 358 F. 2d 557, the appellant was indicted by a Federal grand jury in Texas for conspiracy to rob a bank and having robbed it. Counsel was assigned the accused. While in custody, and without notice to counsel, he was taken to a lineup and identified by the bank president and cashier. The court *inter alia* adopted the position of the dissenting judges in *Stovall, supra,* holding that the compulsory confrontation of the accused with the victim of a crime for identification purposes after indictment and without notice to counsel violated the Sixth Amendment and warranted a reversal.

In *Stovall, supra,* to the argument that the police could have transported the accused to the hospital for identification purposes before arraignment so why not after, Justice Friendly in *Stovall* replied:

> "But many things can be done in the absence of counsel in the investigation stage before the 'criminal prosecution' begins, which cannot lawfully be done later, as Massiah v. United States, supra, plainly shows." At page 745.

It was this distinction which explains Mr. Justice Stewart's changeover from writing the majority opinion in

Massiah to dissenting in *Escobedo* which involved the refusal of counsel at a pre-judicial stage of the criminal proceedings. In the *Escobedo* dissent, 378 U. S. 478, 493 (1964), Mr. Justice Stewart spoke for himself as follows:

> "Massiah v. United States, . . . is not in point here. In that case a federal grand jury had indicted Massiah. He had retained a lawyer and entered a formal plea of not guilty. Under our system of federal justice an indictment and arraignment are followed by a trial, at which the Sixth Amendment guarantees the defendant the assistance of counsel. But Massiah was released on bail, and thereafter the agents of the Federal Government deliberately elicited incriminating statements from him in the absence of his lawyer. We held that the use of these statements against him at his trial denied him the basic protections of the Sixth Amendment guarantee. Putting to one side the fact that the case now before us is not a federal case, the vital fact remains that this case does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him. The Court disregards this basic difference between the present case and Massiah's with the bland assertion that 'that fact should make no difference. . . .'"

It is "that fact", I submit, which makes all the difference. Under our system of criminal justice the institution of formal meaningful judicial proceedings, by way of indictment, information or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point the constitutional guarantees attach which pertain to a criminal trial. Among

those guarantees are the right to a speedy trial, the right of confrontation, and the right to trial by jury. Another is the guarantee of the assistance of counsel." At page 494. Cf. *Spano* v. *New York*, 360 U. S. 315, 327 (1959) (Stewart, J. concurring).

In view of the fact that Gilbert was denied his right to counsel after the commencement of judicial proceedings, the case must be reversed.

III.

Petitioner after being apprehended in Pennsylvania by federal agents asserted his right to an attorney and his right to silence. Nevertheless, through unwarranted questioning at the least and probable trickery, Gilbert was compelled to furnish the agent with handwriting exemplars which were used to prove guilt of the charges against him. Thus, his Sixth, Fifth and Fourteenth Amendment rights were violated.

F.B.I. Agent Dean arrested Gilbert in Philadelphia on February 26, 1964. Dean attempted to interrogate Gilbert about the Alhambra bank robbery but Gilbert refused to talk until he obtained the advice of counsel. Later on the same day, another agent attempted to interrogate Gilbert. The agent, Shanahan, told him that he was not required to say anything without advice from an attorney and that any statement he furnished might be used against him. Gilbert expressed his intention not to talk about the California bank robbery but agreed to talk about other matters. Shanahan interrogated Gilbert about Philadelphia robberies in which a demand note had been used and Gilbert was asked to give some samples of his handwriting. Gilbert then wrote some exemplars. Shanahan testified that

the exemplars were obtained for the purpose of investigating the Philadelphia robberies and they were thereafter filed by the F.B.I. in the same manner as fingerprints. He did not tell Gilbert that the exemplars would not be used in any other investigation. (See 63 Cal. 2d at 708.)

The prosecution in California sought to introduce Exhibits 74-A through H, which were Gilbert's handwriting exemplars obtained by FBI agents in Philadelphia. Gilbert objected to their use upon the grounds that they were obtained in violation of his Fifth and Sixth Amendment rights (R. 1850, 1851, 1856, 1857). The Court below denied said objections (R. 1852).

In addition, an expert who identified Gilbert's handwriting on the bank-area drawing found in his apartment by comparison with the exemplars so testified and similar motions were again denied (R. 1892, 1908, 1912).

The California Supreme Court never reached the Constitutional objections to the handwriting exemplars for it concluded that Gilbert had waived his Constitutional rights by consenting to providing the exemplars in question. 63 Cal. 2d at 708, 47 Cal. Rptr. at 920 (1965).

Initially, we can now say with certainty that the record displays anything but a waiver under the above facts. The prosecution carries a "heavy burden" when it seeks to establish that the defendant has surrendered a Constitutional right. *Miranda* v. *Arizona,* 86 S. Ct. 1602, 1612, 1628 (1966). As a matter of fact, when Gilbert first explained he didn't desire to talk until he was advised by an attorney, the Federal Agents' right to further interrogation abruptly ceased. *Miranda* v. *Arizona,* 86 S. Ct. at 1627, 1628. Unless and until Gilbert acquired an attorney, his wishes

must have been honored and the continued requests for information, oral or written which produced the handwriting exemplars were in contravention of Gilbert's Fifth, Sixth and Fourteenth Amendment rights. *Miranda, supra,* at pp. 1628, 1638-39.

The requirement of a clear and intelligent waiver before Constitutional rights are lost has been with us for a long time. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Gibbs* v. *Burke,* 337 U. S. 773 (1949); *Hawk* v. *Olson,* 326 U. S. 271 (1945); *Johnson* v. *United States,* 225 U. S. 405 (1912). Its most graphic explication but not its origin is traceable to *Miranda.* Thus, the cut-off date of *Johnson* v. *New Jersey,* 86 S. Ct. 1772 (1966) does not apply.

Moreover, after a fair reading is given to the conversation with Agent Shanahan, it is apparent that both Gilbert and the agents were operating under the assumption that the evidence being acquired from Gilbert's lips and pen was limited to the Pennsylvania cases and not to California. Agent Shanahan testified:

> "Well, to clear this up, when I first started to talk to him, I asked if he would like to talk to me, you know, and he said he would providing it didn't pertain to the case here in California. That he would agree to talk to me, so I interviewed him on that basis, that I wouldn't talk about the California case. I just wanted to talk to him about the cases that we were interested in in Philadelphia" (R. 1833-1834; A-15-16).

Either the handwriting samples were obtained by subterfuge and false representations or the Agent should be held to his word and should not have used the information Gilbert supplied to convict him of crimes in California.

The California Supreme Court concluded that even if Gilbert believed that the samples would not be used against him in California the belief was not improperly induced by the federal agents. This resembles the venerable white lie. It appears alluring to conclude that if the Agent induced Gilbert to present him with handwriting samples without threats or promises pertaining to any of his cases, the information obtained, since reliable, should be utilized to the fullest lest a guilty man go free. The argument is spurious. It is bottomed on the assumption that Agent Shanahan had a right to the handwriting exemplars to begin with. If Gilbert had the right to refuse giving the exemplars he certainly had the right to furnish them under certain conditions. And the condition explicitly imposed was that Gilbert didn't want to give evidence against himself on the California case. His stated desire should have been honored.

Rather, the Federal Agents employing a technique reminiscent of the tarnished silver platter doctrine, see *Elkins* v. *United States,* 364 U. S. 206 (1960), filed the prints with their nationwide organization clandestinely smug in the not to improbable assumption that the exemplars would soon be summoned elsewhere. The general law of ruse and subterfuge has applicability here and affords an additional reason for exclusion of the handwriting and the testimony based thereon, *Gouled* v. *United States,* 255 U. S. 298, 305 (1921); *Fraternal Order of Eagles, No. 778* v. *United States,* 3rd Cir. 57 F. 2d 93; *People* v. *Reeves,* 61 Cal. 2d 268, 38 Cal. Rptr. 1 (1964).

A. Petitioner's Sixth Amendment Rights Were Violated.

It is unnecessary to repeat all that has been said on the semi-analogous issue of right to counsel at a lineup. Suf-

fice it to say that the only difference between the lineup and the furnishing of handwriting exemplars in the context of the case at bar is the absence of formal judicial proceedings at the point the samples were extracted.

Petitioner acknowledges that the lineup issue is an easier case but that under Sixth Amendment protection against handwriting samples in the absence of acceptable Constitutional waiver, we should reach the same result. Bearing in mind that *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) is squarely a Sixth Amendment case which extends the right to counsel to the inception of custodial interrogation or its equivalent it is only necessary to emphasize the importance of this early stage of the proceedings to the accused in order to appreciate the violation here. The *Escobedo* court held that when the accused was placed in custody and the focus of suspicion had centered upon him, the right to counsel ripened. The Court pointed out that at that stage he needed "the guiding hand of counsel" and by contrast the stage was surely as critical as the innocuous entry of a plea of not guilty in *Hamilton* v. *Alabama,* 368 U. S. 52 (1961). The Court concluded that "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." At page 486. See also the dissenting opinions in *Cicenia* v. *La Gay,* 357 U. S. 504 (1958) and *Crooker* v. *California,* 357 U. S. 433 (1958).

Once the right to counsel attaches, the defendant's right to his assistance begins whether self-incriminatory activities are in the offing or not. See *Wade* v. *United States*

(5th Cir. 1966), 358 F. 2d 557; *Stovall* v. *Denno,* 355 F. 2d 731 (1966) (dissent). A reversal is therefore imperative.

B. The Handwriting Exemplars Taken From Petitioner Were in Violation of His Fifth and Fourteenth Amendment Rights.

The Fifth Amendment provides that no person can "be compelled in any criminal proceeding to be a witness against himself." *Twining* v. *State of New Jersey,* 211 U. S. 78 (1908); U. S. Const. Amendment V. This is the general formulation of the privilege against self-incrimination which is one of the most deeply rooted and sage principles in Anglo-American judicial history. It developed as a protest against the Star Chamber and other accepted procedures for compelling persons to become self-accusers. *Miranda* v. *State of Arizona,* 86 S. Ct. 1602, 1619-20 (1966).

Recently, this Court ruled that the privilege which had hitherto been considered only applicable against the Federal Government was incorporated in the Fourteenth Amendment and thereby transmitted to the States. In *Malloy* v. *Hogan,* 378 U. S. 1 (1964), this Court held that "(t)he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence." At page 8. The decision has since seen reinforcement and elaboration. *Griffin* v. *California,* 380 U. S. 609 (1965).

In *Massiah* v. *United States,* 377 U. S. 207 (1964) this tribunal held that after the arraignment in a Federal

Court the defendant had the absolute right of counsel and self-incriminatory statements extracted from the accused subsequent thereto and in the absence of counsel, without a waiver thereof, were inadmissible.

In *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), this Court applied the *Massiah* rule to *State* courts through the Fourteenth Amendment and held that when an investigation ceased being an inquiry into an unsolved crime and began to focus on the defendant, he was in custody, the officers were seeking to elicit ineriminating statements, he must be warned that he has an absolute right to remain silent and an absolute right to counsel thereafter. See *People* v. *Dorado,* 62 C. 2d 338, 42 C. R. 169 (1965). These standards were reiterated and fuller explication was provided in *Miranda* v. *Arizona, supra.*

There can be no doubt but that the standards laid down in *Escobedo* and *Miranda* render Gilbert eligible for Fifth Amendment protection. The crime had been committed, he was under arrest (Cal. Supreme Court, Opp. p.), the Federal Agents sought to elicit incriminatory matter. Thus, the only question of novelty for this Court is whether the extraction of handwriting exemplars violates Gilbert's Fifth and Fourteenth Amendment rights.

The most recent exposition on the nature and boundaries of the Fifth Amendment, not involving confessions or admissions, is found in *Schmerber* v. *California,* 86 S. Ct. 1826 (1966). There the defendant was convicted of driving an automobile while under the influence of alcohol. This Court by a vote of five to four, held that the evidence of analysis of petitioner's blood taken over his objection by a physician in a hospital after arrest, was not inadmis-

sible on the ground it violated the Fifth Amendment privilege against self-incrimination. The Court expressly refused to follow the Wigmore or narrow view of self-incrimination which defines self-incrimination only in terms of "the employment of legal process to *extract from the person's own lips* an admission of guilt which would take the place of other evidence." 86 S. Ct. 1832 fn. 7. The Court instead posits a broader test:

> "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of analysis in question in this case did not involve compulsion to these ends." At pages 1830-31.

The Court then recognizing that the formulation of a test was far easier than its application, labored to point out that the test was merely a "helpful framework for analysis" and that it did not "agree with its past applications in all instances" and acknowledged that there would be "many cases in which such a distinction is not readily drawn." At page 1832. In fact, the Court explicitly hypothesizes a self-incriminatory situation not involving the extraction of confessions or admissions in the traditional sense. The lie detector which seeks to determine whether a person is telling the truth through his physiological responses measured by changes in body function during an examination would "evoke the spirit and the history of the Fifth Amendment." At page 1832.

Moreover, the Court reaffirmed its half-a-century old holding in *Boyd* v. *United States,* 116 U. S. 616 (1886) by

declaring that "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." At page 1832. The Court noted that the privilege "is as broad as the mischief against which it seeks to guard." At page 1832. *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892).

Finally, the Court concluded that:

> "In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." 86 S. Ct. at 1833.

Although this case is one of first impression for this Court, many cases are available in lower tribunals which have declared that the taking of handwriting exemplars is a violation of the Fifth Amendment or like protection. See Weintraub, Voice Identification, Writing Exemplars and The Privilege Against Self-Incrimination, 10 Vanderbilt Law Review 485, 492-503 (1957). Similarly, some Courts have declined to so hold. Ibid.

The author reviews some of the tests used to determine whether handwriting samples merit Fifth Amendment coverage. Some cases have held handwriting exemplars incriminatory as distinguished from appearing in a lineup, having fingerprints taken or the like on the ground that handwriting involves "*active* participation and *affirmative* conduct" while the latter involves mere "*passive* cooperation." Weintraub, *supra,* at pp. 497-99. Weintraub then refers to another test which would have the privilege of self-incrimination turn on whether the act places reliance upon the veracity of the accused. Ibid. 503. He concludes that a writing exemplar constitutes an implied statement by an accused that it is his natural handwriting and thus under the "veracity test" the Fifth Amendment privilege attaches.

The article cites authority which discloses that handwriting, while premised on the assumption that a person's handwriting is sufficiently unique, like fingerprints, to separate him from the herd, is actually no way near as individualistic and incapable of disguise. See Weintraub, *supra,* p. 497 fn. 43.

The most eloquent statement for treating handwriting as self-incriminatory was found by this counsel in the dissenting opinion of Mr. Justice Peters in *People* v. *Graves,* 64 A. C. 216, 49 Cal. Rptr. 386 (1966). The opinion dealt with a forgery prosecution wherein the defendant without previous admonitions regarding the right to counsel and silence furnished the police with his handwriting exemplars which were then utilized to convict him. The majority never reached the question of self-incrimination because it limited the *Escobedo* rule to confessions and admissions. Justice Peters in dissent pointed out that:

"The United States Supreme Court in *Escobedo* was primarily interested in preventing improper police tactics which spawned involuntary confessions. It concluded that the presence of counsel would go far to eradicate such tactics . . . But those coercive practices thus sought to be restricted are not limited to obtaining confessions in the form of statements from an accused. There is no legal difference between a defendant being coerced into obtaining for the police documents or real evidence not otherwise obtainable by legal process, and being coerced into giving incriminating statements. There is no guarantee that coercive methods will not be used by the police to obtain documents or chattels which are unobtainable by a search warrant because their location is unknown and unobtainable by legal compulsion because the use of such compulsion would violate the defendant's privilege against self-incrimination. Coercion can also be used to elicit incriminating conduct . . . . That handwriting exemplars may be coerced from a defendant in the same manner as are statements is clearly shown by *People* v. *Matteson,* 61 Cal. 2d 466, 39 Cal. Rptr. 1, 393 P. 2d 161, wherein we held handwriting exemplars obtained by brutality to be inadmissible under *Rochin* v. *People of California.*

"It is evident that coercive methods or other improper police practices can be used to elicit incriminating evidence through several other forms than through statements. In each case the accused is persuaded to obtain or create evidence against himself. The fact that such evidence is usually obtained through statements, since this method requires the least action on

the part of the accused and hence the least amount of persuasion, does not obviate the danger that coercive methods will be used to obtain evidence in other ways. On the contrary, because the obtaining or creating of nonverbal evidence generally requires more active participation on the part of the accused, there is a greater danger that coercive methods will be used to obtain such evidence." 49 Cal. Rptr. at 389.

"It is true, as the majority state, that not every aid that a defendant or suspect is required to give the prosecution violates the privilege against self-incrimination. An accused can be fingerprinted, photographed, and measured without his consent; he may be ordered to stand up in court for identification or to try on items of clothing; blood samples may be taken from a suspect without his consent if the means used to obtain them do not shock the conscience. . . . In the above cases, however, the evidence sought relates to the physical characteristics of the defendant and is already in existence. It is universally conceded that one can rely on the privilege in refusing to produce documents or chattels in the face of a subpoena or other legal process. . . . There is a similarity between compelling a defendant to produce a document and compelling him to furnish a specimen of his handwriting for in both cases the witness is required to *actively procure* evidence against himself which is not then present. As stated by one court dealing with handwriting exemplars 'the present case is more serious than that of compelling the protection of documents or chattels, because here the witness is compelled to *write* and *create,* by means of the act of writing, evidence which does not exist, and which may identify him as the

falsifier.' (Beltran v. Samson and Jose (1929), 53 Philippine, R. 570, 577.) It would be a strange paradox if a defendant could successfuly invoke the privilege against self-incrimination in refusing to obtain existing samples of his handwriting, yet could be required to create similar samples by legal compulsion. Compelling a defendant to create samples of his handwriting can certainly not be regarded as *less* objectionable than compelling him to obtain samples already created. Since the samples can be used to prove that the accused wrote the forged checks, they are as much testimonial disclosures as are verbal admissions by the accused that he is the falsifier.

"It is also unreasonable to hold or to imply that the police, without advising a defendant of his right to counsel, can obtain handwriting exemplars at the accusatory stage which show that he wrote the forged checks, when, admittedly they could not request his verbal admission that he wrote those checks. A limitation of *Escobedo* in the elicitation of *statements* would encourage the police to obtain evidence from a defendant in other forms which are within the privilege against self-incrimination without advising him of his right to counsel. Admission of such evidence must therefore be held to constitute a violation of the right to counsel during the accusatory stage as established in *Escobedo*." 49 Cal. Rptr. 390, 391.

It stands to reason as Justice Peters points up that a defendant may be called upon to do many things which are equally as damaging to his case as furnishing a confession or admission; therefore, the *Escobedo* principle should guard against this possibility. Would this court, for ex-

ample, hold that the police without advising the accused of his rights could persuade him to reenact the crime? See *People* v. *Furnish,* 63 A. C. 536, 47 Cal. Rptr. 387 (1965). Additionally, Justice Peters pointed out that it is often actually easier to get someone to perform physical tasks that incriminate than to force a confession from his lips. Moreover, when the accused is actually conscripted to actually perform in such a way as to point the finger of guilt at himself as opposed to sitting quietly in the role of a donor alone and allow his guilt to be sopped up, cf., *Schmerber* v. *California, supra,* the privilege seems applicable.

Although a vague test, it appears that the more the defendant is enlisted to accuse himself—the greater his role—the more likely the attachment of the Fifth Amendment privilege. This seems demonstrably true when the defendant is called upon to actively procure evidence against himself, that is to *write* and *create* evidence which did not previously exist and which may tend to prove his guilt. Certainly in *Schmerber,* the evidence was already in existence and merely needed to be extracted with only the most nominal help of the defendant. Here, Gilbert is called upon to breathe life into a document that when viable spells his own destruction. Even in *Schmerber* the Court recognized that probable cause would have to exist before a person's body can be invaded, 86 S. Ct. at p. 1834, and perhaps some would hold that the documents in *Boyd* would be obtainable by a properly secured search warrant predicated on probable cause for the intrusion. But could any amount of probable cause justify a search warrant directive aimed at compelling the defendant to manufacture evidence against himself which did not previously exist? And of course, if the evidence in *Boyd* is unobtainable even

under a search warrant, it seems ludicrous to protect a defendant's papers in existence and not furnish protection to papers which the defendant must create in order for them to exist. Put another way, the only reason for not protecting Gilbert's writing on paper is that it didn't exist until Gilbert, without appropriate constitutional admonitions, was required to create it.

Under *Boyd*, which is followed in *Schmerber*, the officers could not even utilize judicial process to subpoena into Court the same handwriting exemplars had Gilbert written them before the interview with the agents. Unlike, perhaps the alcohol in Schmerber's system, the documents would not be contraband or fruits or instrumentalities of the crime. See *Entick* v. *Carrington* (19 Howell's State Trials, 1020); *Boyd* v. *United States, supra.* Thus, in this case the Court should regard the handwriting specimens as self-incriminatory in the Constitutional sense.

Justice Holmes once remarked: "It is one of the misfortunes of the law that ideas became encysted in phrases and thereafter for a long time cease to provoke further analysis" (dissent in *Hyde* v. *United States*, 225 U. S. 347, 391 (1912). Though the history of self-incrimination involves examples which are largely oral, this Court has recognized that such a narrow limitation is unwise and cannot endure. *Schmerber* v. *California, supra; Boyd* v. *United States, supra.* This Court must insure that the privilege "is as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892).

It also seems incongruous that the police are forbidden to ask, without appropriate admonitions, whether the accused

wrote the checks but can compel him to write in such a way as to furnish the answer.

One substantial factor in this whole controversy which has been hinted at but never faced is, assuming that there is no right to self-incrimination, to what lengths can a police agency go in obtaining the evidence sought. Is the shock the conscience test of *Rochin* really an adequate remedy and deterrent from superfluous physical coercion? To argue that one has no right to resist certain activity necessitates an evaluation of what happens when they do. It is one thing to say either allow blood to be extracted or your failure to permit it can be used against you as an admission and quite another to suggest to hundreds of thousands of policemen throughout the land that they have a right to get the evidence, the defendant has no right to refuse giving it, *so do your duty!*

Rochin shocked the conscience of this Court precisely for the reason that what was done there was accomplished by force, not that the manner of obtaining the evidence was cruel *per se*. Having one's stomach pumped is medically as innocuous as having one's blood extracted though it does not occur as frequently. But certainly this Court will not point to the routine manner in which persons daily sign their name as evidencing the right of a policeman to take signatures by force. As well state that the vast majority of the population undergo the daily experience of relating their past activities as a premise for choking such information out of them. Although *Schmerber* has been written, counsel feels that it is incumbent upon this court to wrestle with the necessary problem in its wake of what to do when the defendant says, no! A police officer may shoot to kill to prevent the commission of a felony. May he even draw

his pistol to compel handwriting exemplars? May he pummel the suspect or twist his arm? May he deprive the accused of food and drink or necessary sleep until his will is hopelessly broken? The coerced confession defense would be unavailing to a defendant once his actions which are compelled are declared to be outside the pale of protection against self-incrimination. Although these doctrines did not grow up as brothers and have to some extent a different justification they are inseparably entwined in an *Escobedo* context. The cases relied upon to reach the conclusions found in *Massiah* and *Escobedo* were largely coerced confession cases. Moreover, the police have no right to force a person to confess since the confession in order to be admissible must be both voluntary in the sense of not subject to force, threats of force or promises of leniency and must also be trustworthy. *Rogers* v. *Richmond,* 365 U. S. 534 (1961); *Payne* v. *Arkansas,* 356 U. S. 560 (1958). However, if this Court declares that the privilege against self-incrimination is unavailing and the defendant can therefore be compelled to actively perform as part of the law enforcement evidence gathering function, then it obligeth him not to complain of force being used against him for it merely proves him to be a perverse instrument in obstructing lawful detective work.

Many times this Court has erected an exclusionary rule of Constitutional dimensions or otherwise stemming from an acknowledgment that civil remedies against the police tactics were woefully inadequate to deter the forbidden behavior. Here the Court does not even leave the defendant a resort to the civil courts because the police apparently are using the force this court authorizes by implication.

In fact, this Court's decision in the *Schmerber* case, *supra,* encourages the use of force for it suggests that if force is threatened which in turn produces a self-incriminatory by-product such as an admission or confession or perhaps even a steadfast refusal to submit, the by-product may be inadmissible as a violation of the Fifth Amendment. *Schmerber* v. *California, supra,* at p. 1833, fn. 9. Thus from *Schmerber* police officers can get the inner sustenance they need to employ physical force to compel handwriting specimens, take blood samples and the like. If there is no privilege against self-incrimination, force is irrelevant and its products are admissible. If the force is only adequate to induce incriminating statements or a refusal to perform, such evidence is inadmissible due to the Fifth Amendment.

Although the Court suggests that there comes a point where force would be inappropriate, 86 S. Ct. at p. 1830, fn. 4, no indication is provided as to where it begins.

Does it strengthen respect for the "omnipresent teacher" to increase the use and justification for force in an era when too much force by law enforcement, real or fancied, is at the nerve center of so many grievances nationwide? Is it a sufficient answer to speculate that law enforcement will normally resort to only threats of force rather than force itself? Is it society's gain to widen the gulf between the citizen and the policeman?

The Court is on the verge of turning loose a Frankenstein monster—a monster who cannot act with the simplemindedness of a soldier on the battlefield, instructed that the enemy is evil and to kill them at will—a monster who

must tread uncertain mazes on a daily basis with a perplexity of attitude inhering in the situation in which his duty places him. Force is too ominous an entity to unnecessarily place in the hands of those whose training and disposition are tied in with the customary carriage of guns.

The whole society knows that when an officer calls halt that the penalty for disobedience may be great. This simple fact reduces the need for forcible police activity to a minimum. But if a policeman may twist a person's arm or hit him in the jaw in order to persuade him to write and is told that it is his duty—respect for the law will diminish and brutality on both sides will inevitably rise, perhaps appreciably.

If the privilege is nevertheless not available in situations wherein the accused must affirmatively act, it merely reinforces our earlier argument that counsel should be present whether the privilege against self-incrimination is involved or not. For it is doubtful that the police would resort to force with defense counsel as a witness. Furthermore, this recognition merely accentuates the point that when judicial proceedings have commenced, counsel and the Court should be present at all procedures whether self-incriminatory or otherwise. Then a defendant could be punished by contempt if he refused to participate in a lineup etc. and the compulsion of law would serve as a superior substitute for brutality in the station house. This calls to mind the farsighted statement of Professor Morgan:

> "The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates and the opportunities for im-

position and abuse are fraught with much greater danger." Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27 (1949).

IV.

The case against petitioner was derived largely from evidence illegally obtained from a private dwelling without a search warrant, an incident arrest or consent in violation of Amendments Four, Five and Fourteen of the United States Constitution.

A. How the Question Arose.

At trial, appellant objected to the introduction of certain testimonial and physical evidence upon the ground that it was unlawfully seized, or was the fruit of an unlawful search and seizure. A voir dire examination was held on the search and seizure issue (R. 1147 et seq.) followed by a defense motion to suppress said evidence upon the foregoing constitutional grounds (R. 1385/25-1386/14). Said motion was denied by the trial court (R. 1408/16-17).

The evidence included within said motion to suppress is set forth below, together with additional defense objections on search and seizure grounds and rulings thereon.

PHYSICAL EVIDENCE

Exhibit	*Nature of the Evidence*	*Objections and Rulings*
Ex. 14	Coin wrapper from Alhambra Savings and Loan	R. 2325/7-8
Ex. 46 46a 46b	Appellant's photograph	R. 1437/26-1438/1; 2332/24-2333/13, 26
Ex. 47) 48) 49)	Photograph of apartment	R. 1441/8-9 1440/7-9 1466/7-13
Ex. 50	.45 cal. magazine clip	R. 2334/22-23, 2335/6-7
Ex. 52) 52a)	Photograph of apartment	R. 1439/22-23; 2337/21-22
Ex. 54	Alpha Beta bag	R. 1505/6-7 2337/23-24
Ex. 56) 56a)	Notebook Sketch from note book	R. 2337/10-13, 24 2337/10-13, 24
Ex. 69	Photo of note pad	R. 2342/8-11
Ex. 70) 70a)	Fingerprints lifted from items in apartment	R. 2342/14-18
Ex. 71) 72)	Fingerprint comparison cards	R. 2342/23-2344/5
Ex. 74a-h	Handwriting specimens from Philadelphia (denial of counsel)	R. 2344/13-2345/3
Ex. 75	Handwriting specimens	R. 2346/5-20
Ex. 76	Illustrations of handwriting analysis	R. 2347/14-15

TESTIMONIAL EVIDENCE

Identification witnesses	R. 1385/7-24; 1408/16-17, 2357/25, 2358/8
Done E. Mire (handwriting expert)	R. 1935/26-1936/10

B. SUMMARY OF FACTS UNDERLYING THE SEARCH AND SEIZURE CLAIM.

Following the Alhambra bank robbery, Officer Billy Nixon searched the area to pick up the trail of the robbers. While doing so, he was hailed by a man who claims to have seen two men get out of one white car into another, then drive off in a northbound direction (R. 1057/15-1058/3; 1082/10-16). A few minutes later, Nixon came upon the white Pontiac which had been used by the two robbers as a get-away car (R. 1062/17-24).

Shortly thereafter, Nixon found Weaver, mortally wounded, sitting in a blue and green Chevrolet (R. 1068/23-1069/1; 1082/17-24).

Nixon accompanied Weaver to the hospital. Upon arrival, or shortly thereafter, he talked to FBI Agent James A. Norton. Norton then proceeded on up to interview Weaver.

Although there were three men involved in the robbery, the getaway driver being the third, Nixon had seen only two fleeing from the bank. There is no evidence that Nixon realized or informed other law enforcement officers of the

possibility of a third man. Officer Norton stated that Nixon had told him Weaver was one of the men who had participated in the robbery, but that Nixon had *not* indicated how many others he suspected were involved. (R. 1213/18-26).

Norton interviewed Weaver, who, after some prodding, identified "Skinny" Gilbert as his accomplice in the robbery. Norton immediately phoned the information into headquarters. This was about 12:15 P.M. (R. 1206/16-1208/3). Later, Weaver gave a description of where Gilbert lived, mentioning an apartment with a Hawaiian-sounding name (R. 1208/15-22). Norton phoned that information in, and also learned about that time that Skinny Gilbert was appellant (R. 1209/25).

Norton did not know Weaver, had never heard of him before. During his interview with Weaver, the latter was evasive and less than candid (R. 1216/17-25). Weaver admitted a prison record (R. 1217/3-6).

Meanwhile, at 12:30 P.M., FBI Agent Deal Keil received a radio assignment to proceed to Riverside and Los Feliz, and look for an apartment building with a Hawaiian-sounding name (R. 1172/24-1173/18).

By 1:00 P.M., he had found the building and radioed back the address. At that time, Keil had Gilbert's name as a possible suspect (R. 1173/25-1174/8).

Keil then ascertained that there was an Apartment 28, which he had been told to look for, and learned from the landlady that it had been rented to a Robert Flood *who had just left* for San Francisco for a few days (R. 1174/19-1175/1, 1177/7-15). In fact, Keil saw Flood talking to the landlady as he, Keil, entered the building; and saw Flood leave (R. 1178/22-26).

About ten minutes later, two other FBI Agents Schlatter and Onsgaard, arrived at the apartment building. Keil told them that a Robert Flood had rented the apartment, and had "apparently just left . . ." the building as he had come in. Schlatter and Onsgaard obtained a key from Mrs. Wilner, and entered Apartment 28. They searched the apartment and found an Alpha Beta shopping bag, rolls of coin, and a sketch of the Alhambra Savings & Loan Bank (R. 1253/19-1254/3) and a clip from a gun (R. 1255/1).

They also found appellant's photograph in an envelope lying on a bedroom dresser (R. 1301/23-24). Schlatter took the pictures and turned them over to Keil who in turn delivered them to Agent LaJeunesse at the Alhambra bank. LaJeunesse made copies of the photograph and showed them to witnesses for identification purposes (R. 1289/7-13).

Agent Schlatter testified that en route to the apartment building, information came over the radio that a third man was involved in the getaway car (R. 1246/15-21). He was of the belief that the third man might still be in the apartment (R. 1249/13-17), and he entered the apartment to find out (R. 1250/15).

Agent Schlatter admitted that before entering the apartment, he had learned from the apartment manager and from Keil that Flood had borrowed a key from her and had returned it (R. 1267/12-25; 1269/1-11); and he knew, before entering, that the resident of that apartment had left (R. 1270/11-12). He had no information that anyone else was in the apartment (R. 1280/6).

Later that day, a search warrant was obtained for stolen money and firearms (Exhibit 51). By this time, the .45 ammunition clip, note pad and sketch, the Alpha Beta bag

and rolled coins therein, had been inventoried and seized (R. 1312/4-7). A search for firearms and money revealed over $3,000.00 in currency sealed under some shirts in a dresser drawer (R. 1313/2, 1314/4-5). None of that currency pertained to the Alhambra bank robbery.

Several days later, a second search warrant was issued (Exhibit 55), pursuant to which numerous personal items were seized.

C. ARGUMENT.

Evidence obtained as the result of an illegal search is inadmissible in a state court. *Mapp* v. *Ohio*, 367 U. S. 643. Moreover, the standards for determining whether a search is reasonable are identical under both the Fourth and Fourteenth Amendments. *Ker* v. *California*, 374 U. S. 23.

Since the search in this case was of a dwelling (apartment), it could not be justified in the absence of a search warrant, "notwithstanding facts unquestionably showing probable cause." *Agnello* v. *United States*, 269 U. S. 20 (1925); *Taylor* v. *United States*, 286 U. S. 1 (1932); *Johnson* v. *United States*, 333 U. S. 10 (1948); *McDonald* v. *United States*, 335 U. S. 451 (1948); *Jones* v. *United States*, 357 U. S. 493 (1958); *Chapman* v. *United States*, 365 U. S. 610 (1960).

Only the doctrines of a search incidental to an effected arrest or a valid consent obtained by one authorized to give it operate as exceptions to this rule. *Stoner* v. *California*, 376 U. S. 483 (1964). Neither of these exceptions has application here.

The cases are legion which hold that a manager, landlady or landlord cannot consent to the search of another person's chosen domicile, albeit rented. *Stoner* v. *California*, 376

U. S. 483 (1964); *Lustig* v. *United States*, 338 U. S. 74 (1949); *United States* v. *Jeffers*, 342 U. S. 48 (1951).

Moreover, the *Stoner* case, *supra*, removes any doubt that the search here can be regarded as incident to a legal arrest. For in *Stoner*, as in *Gilbert*, the police were on the trail of two men accused of robbery (here, robbery-murder). As quickly as the information was gathered as to their whereabouts the police agencies in the respective cases went directly to the addresses which they believed contained the suspects. In each case, the person in charge of the apartment or hotel room was sought out for the key and complied by producing it to open the defendant's room. In neither case was the defendant found in the room; nevertheless, searches were undertaken resulting in the discovery of evidence damaging to the defendant's case. The defendants were apprehended elsewhere so the searches were not contemporaneous with the arrest and were at a place distant therefrom; thus the "search incident doctrine" is of no benefit to the prosecution. *Stoner, supra; James* v. *Louisiana*, 86 S. Ct. 15 (1955).

Although the California Supreme Court suggests that the *Stoner* case is distinguishable and the "exigent circumstances" notion mentioned in the old *McDonald* case (335 U. S. 451) justified the search due to the fact that the officers were in fresh pursuit of the bank robbers—the facts do not allow for such a conclusion.

Nowhere, we repeat *nowhere* is there any evidence that Gilbert was holed up in the apartment house which the officers visited and searched. The mere fact that the officers had some hearsay knowledge that Gilbert lived in Apartment 28 of an apartment building with a Hawaiian-sounding name in a certain neighborhood did not justify going to the apartment as the police did and searching it without per-

mission of the lawful occupant. Of significance is the fact that the officers took time out to seek out the manager, await the termination of her conversation with another, obtained a key and unlocked the door (R. 1192), rather than kick it in, is persuasive of the fact that they didn't expect to find the gunman at home but rather were *looking for evidence* against him.

Moreover, as in *Stoner, supra,* the law enforcement officials knew that the resident had just left and thus would not be found in the apartment. Only speculation could justify their proffered belief that perhaps one of the two remaining robbers was inside at the location. If this interpretation were allowed, then *Stoner* was incorrectly decided for in *Stoner* there was nothing to indicate to the officers that the second robber was not in Stoner's hotel room. In fact, if anything, recognition that the law was hot on Gilbert's trail would make it less likely that he would be holed up in Flood's apartment than that the companion robber would be living in Stoner's room since he had no special reason to assume that the police knew of *his* crime nor of his whereabouts.

The California Supreme Court thought it crucial that the search of the hotel room in *Stoner* was executed two days after the robbery and here less than two hours had elapsed. The Court thereby distinguishes *Stoner* because there was sufficient time to obtain a search warrant. 63 Cal. 2d 707. Disregarding the fact that the last direct ruling on the failure to obtain a search warrant when time permitted resulted in a declaration by a majority of this Court that such a failure would not render the ensuing search unreasonable, *Rabinowitz* v. *United States,* 339 U. S. 56 (1950), the fallacy in the Court's reasoning is its assumption that the officers had sufficient time to do so in *Stoner.* Certainly,

the number of days which elapse after a crime has been *committed* is no necessary indication that ample time was afforded to obtain a search warrant since the search warrant must be supported by an affidavit containing probable cause that contraband items, or the like, are located at a specified location. *Aguilar* v. *Texas,* 378 U. S. 217 (1960). Proof that a crime has been committed alone no matter how incontrovertible, furnishes no justification for arrest of a given individual nor a search of a certain location. In *Stoner,* the officers found Stoner's checkbook near the scene of the robbery, in the parking lot adjacent to the food market which was robbed. They then noted that two of the stubs had been drawn to the order of the Mayfair Hotel in Pomona. Certainly, the knowledge related thus far would have been considered far too puny to justify a search of Stoner's living quarters. Next the police learned that Stoner had a prior criminal record, which only slightly improved their search warrant prospects. See *United States* v. *Gebell,* 209 Fed. Supp. 11 (1962); *People* v. *West,* 237 Cal. App. 2d 801, 47 Cal. Rptr. 341 (1965); *People* v. *Reeves,* 61 Cal. 2d 268, 38 Cal. Rptr. 1 (1964). The police then obtained a photograph of Stoner from the Pomona police department. This photograph was subsequently presented to the two eyewitnesses to the robbery who both said the picture resembled the man who carried the gun. (The man was wearing goggles and a hat.) Then, and only then, did the police go to the Mayfair Hotel in Pomona. There is absolutely nothing in the *Stoner* opinion which even so much as suggests that the police had time to procure a warrant before inaugurating their search and the opinion certainly does not even hint that the factor was of any significance.

Although there is language in *McDonald* v. *United States, supra,* suggesting that an officer may ignore the search warrant requirement, this doctrine has lain fallow ever

since precisely for the reason that the exigent circumstances envisioned there have never occurred.

Mr. Justice Douglas, speaking for a majority in *McDonald* portrayed emergency circumstances as follows:

> "Here, as in *Johnson* v. *United States* and *Trupiano* v. *United States,* the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor likely to be destroyed as the opium paraphernalia in the *Johnson* case. Petitioners were busily engaged in their lottery venture. No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. Both those reasons are no justification for by-passing the constitutional requirement . . ."

Here the apartment could have been surrounded with a police cordon while a search warrant was being expeditiously prepared. Gilbert could neither leave nor enter.

To distinguish *Stoner* on a few varying facts would lead to confusing Constitutional doctrine which would unnecessarily raise a plethora of problems for our lower courts. This tribunal should resist drawing a distinction so fine that difficulties in application will be insurmountable and unrelenting.

Furthermore, the search actually launched betrayed the claim that the reason for entry was to dislodge Gilbert. The fact that the officers took time out to obtain a key from the manager (R. 1177) and unlocked the door (R. 1192), rather than kicked it in, is persuasive of the fact that they didn't expect to find the gunman at home but rather were looking for evidence against him. Since it is clear that an

arrest cannot be used as a pretext for a search (*Abel* v. *United States*, 362 U. S. 217, 225-6 (1960); *Jones* v. *United States*, 357 U. S. 493, 500 (1958); *Harris* v. *United States*, 331 U. S. 145, 153 (1947); *United States* v. *Lefkowitz*, 285 U. S. 452, 467 (1932); *United States* v. *Robinson* (2nd Cir. 1963), 325 F. 2d 391; *United States* v. *Harris* (6th Cir. 1963), 321 F. 2d 739; *Taglavore* v. *United States* (9th Cir. 1961), 291 F. 2d 262, 265; *Keiningham* v. *United States* (D. C. Cir. 1960), 287 F. 2d 126; *Worthington* v. *United States* (6th Cir. 1948), 166 F. 2d 557-566; *United States* v. *Smalls*, 223 F. Supp. 387 (1963); *United States* v. *Evans*, 194 F. Supp. 90 (1961); see also *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1930); *Ker* v. *California*, 374 U. S. 23, 42 (1963); *Henderson* v. *United States* (4th Cir. 1926), 12 F. 2d 528), this search was unequivocably invalid.

Moreover, after a search lasting from a few seconds to a minute, the officers learned Gilbert was not in the apartment (R. 1271/13-18). This they admitted. Ibid. Nevertheless, Agent Schlatter continued to scour the premises for thirty additional minutes and upon leaving noted that other police officials were still at work (R. 1271/21-22). The harmful photographs which were used to gather identifying witnesses were removed in the course of this search from an envelope lying on the bedroom dresser (R. 1301/23-24). Although Gilbert's precise description was unknown to Agent Schlatter, it can hardly be contended that Gilbert had suddenly become sufficiently diminutive to fit inside an ordinary envelope. Furthermore, although the lower court suggested that suspicious objects in plain view may be inspected (63 Cal. 2d 707), it was necessary to *open* the innocuous appearing envelope in order to locate Gilbert's pictures. Since the search was exploratory, *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Henderson* v. *United States* (C. A. 4th), 12 F. 2d 528, 51 A. L. R. 420, it was illegal.

The court below implies in its opinion that the photographs were removed pursuant to a warrant that issued January 3, 1964 (see A-13, no. 5); the record indicates that Agent Schlatter entered at approximately 1:30 P.M., with the photographs being removed about 15 minutes later (R. 1195, 1256). The search warrant issued at approximately 4:00 P.M. (R. 1283). The photographs were taken to the association where they were enlarged by Polaroid process and shown to eyewitnesses (R. 1288-1292). They were also used before the grand jury for identification purposes (R. 2332-2333). There is no suggestion in the opinion of the court below that the evidence upon which Gilbert was convicted came from any source other than the exploitation of the entry into his apartment.

That the Government cannot profit from the illegal search by later obtaining a warrant to obtain the same materials originally illegally possessed was forcefully declared by Mr. Justice Holmes in the early case of *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920):

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and they may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States*, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not

> the law. It reduces the Fourth Amendment to a form of words (citation omitted). The essence of a provision forbidding the acquisition in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U. S. 391.

In accord: *People* v. *Berger*, 44 Cal. 2d 459, 282 P. 2d 509 (1955).

The exclusionary rule was first fashioned to impose a meaningful sanction against unlawful search and seizure. *Weeks* v. *United States, supra; Mapp* v. *Ohio*, 367 U. S. 643, 660 (1961); *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955). To allow secondhand use of illegally seized evidence through the mouths of witnesses creates an unfair temptation to police officers to bend the requirements of the law to secure useful information. Cf., *People* v. *Stoner*, 241 A. C. A. 814, 50 Cal. Rptr. 712 (1966). The use of photographs before the grand jury for identification purposes fatally infected the indictment and trial in the case at bar in that such use was plainly the exploitation of the initial illegal entry and search. The witnesses procured in part through the use of the illegally seized photographs, should be prevented from doing exactly what the police meant to do when they took the photographs from the apartment, i.e., to implicate Gilbert in the robbery. Similarly, all other direct discoveries in the apartment and their fruits must be denied admission in evidence. *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Silverthorne, supra;* see *Nardone* v. *United States*, 308 U. S. 338 (1939).

Respectfully submitted,

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Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1966
No. 223

JESSE JAMES GILBERT,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

QUESTIONS PRESENTED.

We submit that the primary questions presented for review (numbers 2 through 5, Petition for Certiorari, pp. 3-5; 384 U.S. pp. 985-986), may be phrased as follows:

1. Was petitioner Gilbert denied due process of law when his co-defendant's extrajudicial statements and testimony incriminating Gilbert were received in evidence (and were later found by the California Supreme Court to have been erroneously received), and when the trial court gave extensive admonitions to the jury limiting the consideration of the co-defendant's statements to the case of the co-defendant alone, and when the roles of Gilbert and the co-defendant could be readily distinguished, and the district attorney in

arguing to the jury discounted that portion of the co-defendant's statements to the effect that the co-defendant was under compulsion from Gilbert?

2. Was there an unreasonable search and seizure when officers, in fresh pursuit of a fleeing robber and killer, and following a lead from a wounded accomplice, entered Gilbert's locked apartment without a warrant of arrest or search, in his absence but with the intent of apprehending Gilbert or a confederate if he should be inside, and removed therefrom some small photographs of Gilbert, a reproduction of which was shown witnesses who later testified at the trial and identified Gilbert in the courtroom as a participant in the robbery; and the officers later took other objects from the apartment in connection with the issuance of search warrants?

3. Was Gilbert's right to the assistance of counsel violated by his being placed in a police lineup subsequent to his indictment when his counsel was not present, at which lineup Gilbert was required to exhibit himself and to speak for identification?

4. Was Gilbert's right to the assistance of counsel violated when he declined, in the absence of counsel, to discuss the offenses in question, following his arrest in Philadelphia, but later that same evening, after he was advised of his right not to say anything without advice from an attorney, he agreed to talk with an FBI agent about robberies in Philadelphia wherein a demand note was used, and in which discussion Gilbert voluntarily gave handwriting exemplars utilized in the present trial relative to a diagram of the scene of the robbery?

STATEMENT OF THE CASE.

A. Procedural Summary.

In an indictment returned March 10, 1964 by the Grand Jury of Los Angeles County petitioner Jesse James Gilbert and defendant Robin Charles King, Jr., were charged in Counts I and II with murdering George Davis and Edgar Ball Weaver, respectively, on or about January 3, 1964, and with being armed with a deadly weapon, a pistol, at the time of the commission of said offenses and at the time of arrest. [Cl. Tr. pp. 1-2.][1] The other counts pertained to the same date and contained the same charges of being armed. In Count III the defendants were charged with robbing the Mutual Savings & Loan Association of Alhambra of money in excess of $200. [Cl. Tr. p. 3.] In Counts IV through VII they were charged with kidnaping for purpose of robbery Victor J. Liechty, Sandy Butler, Nellie Riddle, and Bernice Thain, respectively. [Cl. Tr. pp. 4-7.]

Gilbert admitted the charges of two prior felony convictions, murder and burglary. [Cl. Tr. p. 227.]

Following pleas of not guilty, the defendants were tried before a jury. [Cl. Tr. pp. 17, 25.]

The defendants' motion for exclusion of witnesses was granted, excepting by stipulation the police investigating officer. [Cl. Tr. p. 25; see also Rep. Tr. p. 3360.]

The defendants were found guilty as charged with respect to all counts. They were found guilty of murder in the first degree as to Counts I and II, and robbery

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[1]The case is being heard on the typewritten record. "Cl. Tr." refers to the Clerk's Transcript thereof. "Rep. Tr." refers to the Reporter's Transcript thereof as it pertains to the trial in chief, which commences with Volume 6.

in the first degree as to Count III. As to the remaining counts they were found guilty of kidnaping for robbery without bodily harm. The charges of being armed were found true as to Gilbert and not true as to King. [Cl. Tr. pp. 143-44.]

After further proceedings the jury fixed the punishment as death for Gilbert on Counts I and II, and life imprisonment for King on Counts I and II. [Cl. Tr. p. 201.]

The defendants' motions for new trial were denied. Gilbert was sentenced to death on the murder counts and to imprisonment in the state prison for the term prescribed by law on the other counts. King was sentenced to life imprisonment on the murder counts and for the term prescribed by law as to the other counts. [Cl. Tr. pp. 227-29.]

King appealed from the judgment, and Gilbert's appeal was automatic. On December 15, 1965 the California Supreme Court reversed the judgment as to King and reversed the judgment as to Gilbert on Count II. In all other respects the judgments as to Gilbert were affirmed. Gilbert's petition for rehearing was denied February 9, 1966. (*People v. Gilbert*, 63 Cal. 2d 690, 696, 712, 717, 47 Cal. Rptr. 909, 912, 923, 408 P. 2d 365, 368, 379.)

On June 13, 1966, Gilbert's petition for certiorari was granted.

B. Factual Summary.

1. Circumstances Culminating in the Shootings.

Sandra Butler was employed as a senior teller at the Mutual Savings & Loan Association of Alhambra on January 3, 1964 when she heard a voice say, "Everybody freeze; this is a hold-up," at about 10:40 or 10:45 a.m. She turned around and faced petitioner Gilbert who made the statement. He had a gun in his hand. [Rep. Tr. pp. 43, 45-48, 69.] Gilbert threw at Miss Butler a brown paper grocery sack with the name Alpha Beta on it and told her to put money into it. Then he went upstairs. [Rep. Tr. pp. 64-65, 67.] Miss Butler and four other tellers placed their money in the bag. [Rep. Tr. pp. 68-69.] Miss Butler noticed a second man. Edgar Weaver, just inside the entrance to the building. He had a gun in his hand. [Rep. Tr. pp. 32, 80-81, 101.]

Victor Liechty was performing an audit, on the second floor of the building, when Gilbert entered the room, pointed a gun at him, told him to put down the telephone and directed him to come. Gilbert motioned him to go down the stairway and Mr. Liechty complied. [Rep. Tr. pp. 198-202.] Gilbert directed Mr. Liechty toward the vault area and told him to open the vault. Liechty opened the inner door of the large vault with a key which was nearby. Gilbert asked for money. Liechty told Gilbert that Miss Butler had the key to the money cabinet. Gilbert then called for Miss Butler. [Rep. Tr. pp. 203-05.]

Gilbert directed her to bring the keys. She took the keys and went to the vault. Gilbert told her to open the cash boxes but she told him there was no money in

them. Then Gilbert had her open the vault which contained money, consisting of rolled coins. He reached down and took a box from the vault and placed it on the top of the big vault. [Rep. Tr. pp. 85, 87-88, 95.] Gilbert ascertained that another employee, Nellie Riddle, had the key to a certain cash box in the vault. He called for Mrs. Riddle. [Rep. Tr. p. 96.]

In obedience to Gilbert's direction, Mrs. Riddle went back to the vault. Gilbert asked her to open certain locked compartments but she informed him there was no money in them. He asked her if she was certain and she assured him that she was. He then asked her, Miss Butler and Mr. Liechty if he (Gilbert) had all the cash in the vault and they assured him he did. Gilbert then directed them to leave the vault. He prodded Mrs. Riddle with his gun. [Rep. Tr. pp. 298-302.]

Miss Butler returned to her place at the teller's window. After leaving the vault area, Gilbert stopped near Miss Butler's window and set down the box containing money. He told Miss Butler to put the money into the Alpha Beta grocery bag. She started to do so. Gilbert then went to the first teller's window, opened the drawer for more money and threw it into the bag. [Rep. Tr. pp. 98-99.]

Altogether $11,492 was taken. [Rep. Tr. p. 315.]

As Gilbert was extracting money from the drawer Weaver called out, "Police." [Rep. Tr. pp. 212-13.] Police Sergeant George Davis, in uniform, came through the front door, armed with a gun, and ordered Weaver to put down his gun. Weaver hesitated and then threw his gun on a table. [Rep. Tr. pp. 213-14, 770, 1039.]

Bernice Thain, another employee of the bank, was in the area. Gilbert seized hold of Mrs. Thain's left arm from the rear and pushed her in front of him toward the door. Sergeant Davis moved slowly back. [Rep. Tr. pp. 111-12, 427.] Gilbert told Davis to put down Davis' gun or Gilbert would shoot the lady. Gilbert's pistol was pointed at Mrs. Thain's head. Davis said, "You will never shoot." Gilbert gave Mrs. Thain a push forward, then there was a shot followed by another shot and Sergeant Davis fell backward bleeding from his head. [Rep. Tr. pp. 428-30, 1016, 1046, 1048.] He died from a gunshot wound of the forehead. [Rep. Tr. pp. 18, 21.]

As Gilbert and Mrs. Thain were at the door, Weaver picked up his gun and went out of the building with them. After the shooting and after Sergeant Davis fell, Weaver and Gilbert ran off. [Rep. Tr. pp. 776, 1044, 1048-49.]

Summoned by radio to the scene, Alhambra Police Officer Billy Nixon stopped his police vehicle across from the bank. He drew his revolver as Sergeant Davis was backing through the entrance. [Rep. Tr. pp. 1038-40, 1048.] Just after Sergeant Davis was shot, Officer Nixon fired at the larger of the two robbers, *i.e.*, Weaver, and felt he hit Weaver. [Rep. Tr. pp. 1049-51.] Weaver flinched. [Rep. Tr. pp. 966-67.]

A businessman in the area saw the robbers running, then shortly afterward heard a crash similar to an automobile striking something. Then he saw an automobile emerge from a driveway near a parking area. [Rep. Tr. pp. 1004, 1017, 1022.] The businessman wrote the license number down on a slip of paper and gave it to Officer Nixon, advising him that the persons were in a

white Pontiac. [Rep. Tr. pp. 1023, 1054.] Nixon broadcast this information over his radio. As he drove he saw a group of people pointing north up Cordova. He proceeded north on Cordova one block where it deadended, then turned right until he came to Granada. [Rep. Tr. pp. 1055-56.] About half a block north of Main on Granada a man ran up to him. [Rep. Tr. pp. 1057-58.] The man asked Nixon if the officer was looking for two men that might be trying to get away from something. The man advised Nixon that two men had left a white Pontiac and entered a white 1957 Oldsmobile, then traveled north on Granada. [Rep. Tr. p. 1082.] Nixon communicated this information over the radio. [Rep. Tr. pp. 1076-77.] He drove north on Granada until he reached a point just south of Alhambra Road. There he observed a white Pontiac parked on the east side of the street. [Rep. Tr. p. 1062.] Its license corresponded with that on the slip of paper. [Rep. Tr. pp. 1062-63.] This automobile was stolen, having been parked early that morning by its owner in Hollywood. [Rep. Tr. pp. 414-16.] Beyond the Pontiac almost at the corner, Nixon saw a Chevrolet (possibly blue and green in color); it had run over the curb and into some trees. [Rep. Tr. pp. 1066, 1082.] Inside this automobile was Weaver, covered with blood and semi-conscious. A loaded gun was on the seat alongside him. [Rep. Tr. pp. 1068-69, 1074-75.] Officer Nixon associated Weaver with the happenings at the Savings and Loan; Weaver was similar in size to the man the officer believed he shot. [Rep. Tr. p. 1083.] Weaver was taken to the County General Hospital where he died that night as the result of a gunshot wound which penetrated his body from the rear. [Rep. Tr. pp. 32-35, 40.]

2. Rental of the Los Feliz Apartment.

Betty Willner was assistant manager of the apartment building at 3717 Los Feliz Boulevard, Los Angeles. On Thursday, January 2, 1964, Mrs. Willner rented apartment 28 to Gilbert. Gilbert used the name "Flood." Weaver was with him. [Rep. Tr. pp. 31, 1122-24, 1129.] On January 3, Mrs. Willner saw Gilbert between 11 a.m. and 12 noon. [Rep. Tr. pp. 1126, 1132.] Gilbert appeared to be alone. He asked for the key to his apartment, saying he had left his inside. [Rep. Tr. p. 1126.] About twenty minutes later he returned the key. About a half-hour later he came back and got it. In about a half-hour he returned the key to Mrs. Willner's mother. Mrs. Willner heard him tell her he was going to San Francisco and expected to be gone until Tuesday. [Rep. Tr. pp. 1127-29.] As Mrs. Willner recalled, the time Gilbert was last returning the key, her mother was talking to Dean Keil of the Federal Bureau of Investigation. [Rep. Tr. pp. 1130, 1136.]

3. Evidence Relative to the Search of the Los Feliz Apartment.

(The defendants and counsel stipulated that a closed hearing be held on the issue of whether the search of the Los Feliz apartment was legal, and the following matters were heard outside the presence of the jury. [Rep. Tr. pp. 1147-50.])

Mrs. Willner recalled that about a half-hour after she saw her mother talk to Keil, she (Mrs. Willner) admitted F.B.I. agents to apartment 28, *i.e.*, they took the key. [Rep. Tr. pp. 1151-52, 1156.] She pointed out the apartment to them and they opened the door. [Rep. Tr. pp. 1154-57.] The F.B.I. men told Mrs. Willner

to stand clear of the apartment to a place of safety. [Rep. Tr. pp. 1165-66.]

Dean Keil recalled that he arrived at the particular apartment building (the Los Feliz Lanai) about 1 p.m. January 3, having received a radio call to go to the area of Los Feliz Boulevard and Riverside Drive and look for an apartment with a Hawaiian sounding name. He had only a general description of Gilbert. [Rep. Tr. pp. 1172-74.] Mrs. Smith, the manager, was talking to a man, then the man left. Mrs. Smith informed Keil that Mr. Flood, one of the occupants of the apartment in question, No. 28, had just left stating he was going to San Francisco. Two other F.B.I. agents arrived, Schlatter and Onsgard, and the key to the apartment was given them. They went out and Mrs. Smith's daughter (*i.e.*, Mrs. Willner) went with them. [Rep. Tr. pp. 1176-77, 1180.] Around 1:25 p.m. or 1:30 p.m. Schlatter returned and gave Keil three or four small passport type photographs. [They were all identical to People's Ex. 46; Rep. Tr. pp. 1182, 1437-38.] Keil took these to the Savings & Loan Association in Alhambra, and turned them over to Special Agent La Jeunesse. [Rep. Tr. pp. 1181-83.]

A Special F.B.I. Agent, James Norton, heard about Weaver being at the hospital January 3, and proceeded there. He saw Officer Nixon, then talked to Weaver at about 11:50 a.m. [Rep. Tr. pp. 1202-03, 1205.] Weaver admitted he was in a robbery. [Rep. Tr. p. 1217.] Weaver gave the name "Skinny" Gilbert in response to questions about Weaver getting shot and who was with Weaver. Weaver said Gilbert was an escapee from Folsom. Norton called his office about 12:15 p.m. and relayed this information. [Rep. Tr. pp. 1206-07,

1209.] Later in the conversation Weaver referred to apartment No. 28 and its location (about two blocks from the corner of Riverside Drive and Los Feliz), with a Hawaiian sounding name, as the address of Gilbert. Another officer told Norton that Weaver said (while Norton was out of the room) that Gilbert was registered under the name of Flood. Norton called his office about 12:55 p.m. to relay the further information and the office gave him the name Jesse James Gilbert. Weaver confirmed to Norton that this was the correct name. [Rep. Tr. pp. 1208-10, 1220-21.] Weaver told Norton that no other person except himself and Gilbert was involved in the robbery. Norton did not know whether to believe this. In conversations with his office, his office had indicated the possibility of another person. [Rep. Tr. pp. 1221-23.]

Carl Schlatter, a Special Agent for the F.B.I. was instructed by radio to go to the Mutual Savings & Loan Association of Alhambra on the day in question, relative to a robbery and shooting, and he arrived at 12:40 p.m. [Rep. Tr. pp. 1236-38.] He was then directed to premises on Los Feliz Boulevard, indicated as the residence of one or both robbers. [Rep. Tr. p. 1240.] As he was driving there with another agent and two police officers, he was given the exact address and the full name of Gilbert. [Rep. Tr. pp. 1241-43, 1277.] The name Flood was also mentioned. [Rep. Tr. p. 1269.] He recalled Gilbert's name as a result of Gilbert being a suspect in bank robberies. To his knowledge Gilbert was wanted by the F.B.I. [Rep. Tr. pp. 1244-45.] En route he learned through a radio broadcast that three persons were apparently involved—the two men who were in the bank and a third in the getaway, that one

of the three was wounded and had wrecked a car and that the other two had gotten away in another car. Schlatter arrived at the premises about 1:05 p.m. [Rep. Tr. pp. 1246-47.] He talked to Keil and was advised that one of the occupants of apartment No. 28, Gilbert, had just left. (Keil may have mentioned the name Flood.) He went to the manager and received the key to that apartment. [Rep. Tr. pp. 1247-48, 1267, 1282. Neither he nor his associates had an arrest or search warrant; Rep. Tr. 1261-62.]

"Q. Now, when you [Schlatter] arrived there at the apartment and got this key, will you tell us what your state of mind was at that time in getting the key as to what you were going to do? A. Well, we knew from information previously received, there were three robbers. One was wounded and accounted for, one had just left a few minutes before, and there was a third one unaccounted for. Presumably he was in the apartment.

Q. Was there also in your mind that one of these robbers had shot a police officer? A. Very much so." [Rep. Tr. p. 1249.]

"Q. What was your intention when you took this key and started toward this particular apartment? A. Well, this in our parlance is a raid. We were going into a place presumably where a man is who had just participated in a bank robbery and it is our intention to take him into custody.

Q. Was it also in your mind that he might be armed? A. Very much so.

Q. Is it your opinion that that is good standard operating procedure for law enforcement where the law enforcing officers are in hot pursuit of such a criminal? A. Yes, that is our job.

Q. Did you believe yourself to be in hot pursuit of an individual in that apartment? A. Yes, I did." [Rep. Tr. p. 1250.]

[Schlatter also thought it possible that Gilbert had told the landlady he was going to San Francisco to throw them off the trail, and either might then be in the apartment or more possibly might come back in about a half hour; Rep. Tr. pp. 1280-81.]

Schlatter opened the door and went in with fellow officers. Their first concern was to see if someone was secreted in the place. Accordingly, they searched for a person or a hiding place for a person. They went into closets and looked under beds. In doing this, Schlatter saw several objects in open view. On a coffee table he saw a diagram on an open stenographic spiral notebook [People's Ex. 56; Rep. Tr. pp. 1379, 1441-42] depicting the area of the Savings & Loan Association in Alhambra. [Rep. Tr. pp. 1250-53.] He saw a paper bag with the marking of Alpha Beta markets on it. In the bag there appeared to be rolls of coins. He observed a clip from a .45 automatic. [Sergeant Davis was killed by a shot which could have been fired from a .45 automatic pistol; Rep. Tr. pp. 21-22, 1598.] He also observed a bowl full of money. [Rep. Tr. pp. 1254-55, 1257-58.]

A few minutes after entering the apartment, Agent Schlatter saw a photograph similar to People's Exhibit 46. It seemed to him that an agent had it in his hand; there were a number of photographs. Schlatter took them out of the apartment and gave them to Agent Keil as aforementioned. Schlatter instructed Keil to take one of them to the savings and loan and see if anyone there could recognize it. [Rep. Tr. pp. 1255-56.] Other than

these photographs, Schlatter removed nothing from the apartment and saw nothing else removed. About 10 or 15 minutes after Schlatter entered the apartment someone else there produced another photograph which was a "mug shot" containing a prison number. It seemed to him it had the name Gilbert on it; the group discussed the circumstance that it was of Jesse James Gilbert. It was compared with the one similar to People's Exhibit 46. [Rep. Tr. pp. 1259-60, 1266.]

Roger J. La Jeunesse, Jr., of the F.B.I., recalled that he received People's Exhibit 46 about 2:20 p.m. January 3, 1964 from Agent Keil who brought it to him at the Mutual Savings and Loan. La Jeunesse was supervising the interviewing of witnesses there. The photograph was enlarged and reproduced by means of a Polariod camera and the reproductions were made available to agents there and shown the witnesses present. [Rep. Tr. pp. 1287-92, 1298; see also, Rep. Tr. p. 1334.] [After People's Exhibit 46 was brought out to La Jeunesse, 11 photographs including 2 of Gilbert and one of Weaver were shown witnesses; Rep. Tr. pp. 2199-2200, 2215-16, 2224.]

With further reference to Agent Schlatter's entry into the apartment, "After we had searched for person or persons, and no one was there, it then became a matter of a stake-out under the assumption that the person or persons involved would come back." [Rep. Tr. p. 1258.]

Theodore Crowley, a Special Agent for the F.B.I., was also one of those who entered the apartment. [Rep. Tr. pp. 1300-01.]

"Q. At some time did you [Crowley] see a photograph—I show you exhibit 46. Did you at

that time see a photograph similar to that? A. Yes, sir.

Q. Now, was this photograph laying out visibly so that you saw it as you looked at it, or what was the situation in that regard? A. It was in a small envelope laying on top of a dresser in the bedroom of the apartment.

Q. All right.

Mr. Carr: I have here what looks like an envelope, your Honor, which has imprinted on the face of it 'Marlboro Photo Studio,' giving an address. May it be marked 46-B, your Honor?

...

Q. I show you 46-B. Does that appear to you to be the envelope or similar to the envelope that you saw? A. It appears to be the envelope.

Q. All right. Now, as to this envelope, from what you read on it and from its appearance, did it appear to you to be an envelope containing photos? A. Yes, sir, it did.

Q. As it lay there, could you see that there was something inside of it? A. Yes.

Q. To an extent? A. My impression was that it did contain something.

Q. All right. Where was this envelope when you saw it? A. On top of a dresser in the bedroom.

Q. All right. What did you then do with that envelope? A. I looked in it and saw that there were several copies of a photograph, which is the one I have just seen.

Q. All right. A. And immediately I took it to the living room area of the apartment where I

discussed it with a Mr. Onsgaard, Agent Onsgaard who was in charge in the building, and he instructed me to give it to another agent for him to utilize in pursuing the investigation, and I am reasonably certain that that agent was Mr. Schlatter." [Rep. Tr. pp. 1301-03.]

Crowley also observed the stenographer's spiral notebook and the writing on it. [Rep. Tr. p. 1305.] The diagram reflected the area surrounding the Savings & Loan Association in Alhambra. [Rep. Tr. p. 1306.] He also observed the clip for an automatic pistol, the bag, and rolls of coins in the bag after pushing the paper at the top aside. [Rep. Tr. pp. 1307-08, 1320.] The rolls of coins were found to have markings of the Mutual Savings & Loan Association on them. [Rep. Tr. pp. 1307, 1336.] [The markings were recognized by Miss Butler: Rep. Tr. pp. 93-94, 115-16.] He relayed information as to what had been found to the Los Angeles Office of the F.B.I. [Rep. Tr. p. 1309.] Between 4 and 5 p.m. he was advised that a search warrant had been issued for the apartment. After receiving that information he and other officers gathered material and began to make an inventory. [Rep. Tr. p. 1310.] The federal search warrant was sworn to by Special Agent Logan Lane and was for money and firearms. [Rep. Tr. p. 1311.]

When Crowley arrived, the apartment had already been searched for people; and the instructions he received were to look through the apartment for anything that could be used to identify or continue the pursuit of the particular person, without conducting a detailed search. [Rep. Tr. p. 1319.] En route to the apartment he was advised there was an outstanding warrant for

Gilbert's arrest for unlawful flight to avoid prosecution. [Rep. Tr. p. 1339.] [Gilbert was arrested in Philadelphia, Pennsylvania, February 26, 1964; Rep. Tr. p. 1335.]

Special Agent Lane who signed the affidavit for the search warrant was informed of the robbery and shooting, the involvement of Gilbert and Weaver, and the facts concerning the apartment. [Rep. Tr. pp. 1340-42, 1345-46.] The affidavit reflected Lane's belief that property and money had been concealed at the premises. [Rep. Tr. p. 1342.]

Frank Townsend, Special Agent for the F.B.I. was advised of the issuance of the search warrant between 4:30 and 5 p.m. January 3. [Rep. Tr. pp. 1356-57.] The warrant specified moneys and an ammunition clip. In compliance with the warrant, he took into his custody over $3,000.00, including the rolls of coins, and clip for an automatic. [Rep. Tr. pp. 1358-60.]

Townsend signed an affidavit for a second search warrant January 5, based on information at the premises. [Rep. Tr. pp. 1363-66.] In compliance with said second search warrant, Special F.B.I. Agent John Wallace took into custody on January 5 certain items of evidence found in the apartment, including the stenographic notebook. [Rep. Tr. pp. 1376-81.]

(Motions to suppress evidence on the ground that objects in the apartment were siezed in violation of the provisions against searches and seizure were denied. [Rep. Tr. pp. 1385-1408.])

4. Certain Evidence Pertaining to the Apartment.

F.B.I. Agents Norton [Rep. Tr. pp. 1412-15], Keil [Rep. Tr. pp. 1416-20], Schlatter [Rep. Tr. pp. 1422-

27], Crowley [Rep. Tr. pp. 1433-48], Townsend [Rep. Tr. pp. 1464-71], and Wallace [Rep. Tr. p. 1484], reiterated essential matters previously testified to on the issue of search and seizure, apart from hearsay.

Defendant King's fingerprint was found to be on the Alpha Beta paper sack [Rep. Tr. pp. 1490-91, 1499, 1502], and fingerprints of Gilbert and Weaver were found to be on various objects in the apartment; lifts were taken the late afternoon of January 3. [Rep. Tr. pp. 1543-45, 1632-37, 1649, 1653.]

5. Petitioner Gilbert's Arrest.

Irving Dean, Special Agent for the F.B.I., arrested Gilbert February 26, 1964 in Philadelphia, Pennsylvania, around 9 p.m. Gilbert was armed with a loaded .45 automatic. [Rep. Tr. pp. 1548-51, 1860.] Gilbert was advised of his rights to an attorney, that he did not have to make any statements and that any statement he made could be used against him in court. Thereafter he said, "I wish you people had shot me because I am dead anyway," and "All bank robbers should be in jail." Initially, he identified himself by a different name. He was transported downtown from the scene of the arrest, about three miles. [Rep. Tr. pp. 1575-76.] At F.B.I. headquarters he was asked if he knew a police officer had been killed. He said he heard it on his radio two or three days afterward and also that he was being sought for the killing. When asked, he said he did not know that a person by the name of Weaver had been killed in a bank robbery in Alhambra. [Rep. Tr. pp. 1577-78.] He refused to discuss his activities on either the east or west coast, indicating he wanted to obtain counsel before making any statements. [Rep. Tr. p. 1675.]

6. Evidence on Admissibility of Handwriting Specimens, Outside the Presence of the Jury [See Rep. Tr. p. 1829].

James Shanahan, Special Agent for the F.B.I. had a conversation with Gilbert in Philadelphia later that same evening, February 26 at 10 p.m. [Rep. Tr. pp. 1823-24, 1830.]

Initially, Shanahan advised Gilbert that he did not have to make any statement whatsoever to Shanahan without the advice of an attorney and that any statement he made could be used against him in a court of law; Shanahan made no promises or threats to induce Gilbert to make a statement. [Rep. Tr. p. 1836.] Gilbert gave Shanahan no indication that he (Gilbert) did not want to say or do anything until he had consulted a lawyer. [Rep. Tr. p. 1833.]

> "A. . . . I [Shanahan] asked him if he would like to talk to me, you know, and he said he would providing it didn't pertain to the case here in California, that he would agree to talk to me, so I interviewed him on that basis, that I wouldn't talk about the California case. I just wanted to talk to him about the cases that we were interested in in Philadelphia.
>
> . . .
>
> "Q. Is it your testimony, sir, that you had absolutely no information that these hand samplers were to be used subsequently in Los Angeles, California? A. No, sir. The case that involved the hand printed note was my case in Philadelphia and that was my interest in it, you see." [Rep. Tr. pp. 1833-34.]

Shanahan indicated to Gilbert that he suspected him of some robberies in Philadelphia. There had been a series of robberies, and Shanahan was one of those working on them; they involved the use of a demand note. Shanahan asked Gilbert if Gilbert would give Shanahan some samples of his handprinting and Gilbert agreed that he would. [Rep. Tr. pp. 1830-32.] Shanahan did not assure Gilbert that the handwriting samplers would not be used in any way other than to clear up the alleged involvements in the Philadelphia robberies. [Rep. Tr. p. 1835.] Gilbert made the specimens of handprinting for Shanahan freely and volutarily. No promises of reward or immunity were extended Gilbert and no duress or undue influence was used on him. [Rep. Tr. pp. 1836-37.]

It was F.B.I. policy to secure samples of handprinting of all suspects in bank robberies to compare with samples on file in Washington of bank robberies throughout the country. These samples of handprinting were also kept for further reference as specimens of the handwriting of the individual. It was in the same category as taking fingerprints and keeping the fingerprints on file. [Rep. Tr. p. 1839.]

Gilbert testified on the issue, relating that in the conversation with Shanahan he told Shanahan that he (Gilbert) did not wish to talk about the robberies on the West Coast unless he had counsel present, but that if the matter only involved Philadelphia, he would be glad to cooperate inasmuch as he did not want someone who was guilty to get away [Rep. Tr. pp. 1843-44]; that Shanahan told Gilbert that the matter only involved Philadelphia and that the person in question had attempted to rob financial institutions twice by means of notes. [Rep. Tr. pp. 1844-45.]

Shanahan testified further. He denied that Gilbert told him he did not want to talk about robberies on the West Coast unless he had an attorney present. Gilbert merely said that he did not want to discuss the robberies on the West Coast and that was the reason he would agree to be interviewed by Shanahan. Shanahan did not question Gilbert concerning robberies on the West Coast. Gilbert made no statement that the reason he wanted to talk about the Philadelphia robberies was because he did not want someone guilty to get away, nor did Shanahan tell Gilbert that Shanahan's only interest was robberies around Philadelphia, on the east coast. [Rep. Tr. pp. 1849-50.]

(The court ruled that the writings were given voluntarily and were admissible. [Rep. Tr. p. 1852.])

7. Evidence of Handwriting Specimens, in the Presence of the Jury.

FBI Agent Shanahan related that Gilbert made the samples of handprinting in Shanahan's presence denoted People's Exhibits 74-A through H. [Rep. Tr. pp. 1858-1859, 2345 (74-B not received).] People's Exhibit 75 [Rep. Tr. pp. 1863, 2346] was an exemplar card in the name of Gilbert. [Rep. Tr. pp. 1861-63.] It had been filled out at the Long Beach Police Department January 27, 1960, in the customary procedure following booking. [Rep. Tr. pp. 1874, 1878-83.] An examiner of questioned documents had the qualified opinion that the person who wrote the People's Exhibit 74 series and also People's Exhibit 75 made certain writings on the stenographer's noetbook aforementioned denoted People's Exhit 56. [Rep. Tr. pp. 1890-92.] [Reference was had to the diagram thereon; Rep. Tr. p. 1922.]

8. Defendant King's Statements to the Authorities.

To paraphrase the opinion of the California Supreme Court (63 Cal. 2d at pp. 698-99, 47 Cal. Rptr. at pp. 913-14, 408 P. 2d at pp. 369-70), relative to the testimony of King's statements to the authorities, King related that he met Weaver at a parole meeting. Although he declined to help Weaver rob a "bookie joint" King subsequently accepted Weaver's offer of a hundred dollars to steal an automobile. On the morning of January 3, 1964, King stole a Pontiac automobile and drove it to Los Feliz and San Fernando Road. A friend ("Ralph") followed in King's own white Oldsmobile. Gilbert and Weaver arrived in a green Chevrolet at 10:00 a.m. and King and his friend followed them to Alhambra. Gilbert and Weaver parked the Chevrolet and took the stolen automobile. For a thousand dollars King agreed to wait for them and to drive Gilbert back to his apartment in Glendale. [Rep. Tr. pp. 1940-41, 1950-51, 1963.]

After dropping his friend off at a bowling alley, King waited for Gilbert and Weaver. When they returned, Weaver, who was bleeding badly, approached the green automobile and Gilbert got into King's automobile with a paper sack which appeared to be full of money. Gilbert put a .45 automatic pistol against King's stomach and said he would kill him unless he did what he was told. [Rep. Tr. pp. 1952-53, 1963.]

King drove to Gilbert's apartment. En route Gilbert told King that he and Weaver had robbed a bank. Gilbert said when a policeman entered the bank he used a woman hostage and forced the policeman to back out the door. He shot the policeman and fired two quick shots at a police car he observed parking. Gilbert said

that he thought Weaver had got in his line of fire and that he had accidentally shot Weaver. He also said "I have killed one cop today, and I will kill a lot more before I am through." [Rep. Tr. pp. 1953-56.]

When they arrived at the apartment, King waited with the paper sack while Gilbert obtained a key from the manager. After Gilbert changed to other clothing, he offered King a thousand dollars to drive him to Salt Lake City. King refused. Then Gilbert came toward him holding a pillow. King heard a click and realized that a gun under the pillow had misfired. He begged for his life and after a few moments Gilbert told King to relax, he was not going to kill him. Gilbert gave King $1300, then they left the apartment. King waited as Gilbert returned the key to the manager. They drove to an alley where Gilbert threw the automatic into a trash can. They proceeded to a bar where shortly afterward Gilbert met a woman friend and allowed King to leave. [Rep. Tr. pp. 1957-61.]

The testimony of King's statements, summarized above, was presented near the close of the bulk of the People's testimony. [See Rep. Tr. p. 2102.] Some additional testimony was presented relative to statements outside Gilbert's presence. On several occasions, the court admonished the jurors that they should not consider such testimony with respect to Gilbert. [Rep. Tr. pp. 1939, 1967-68, 2131, 2292, 2317; see also Rep. Tr. p. 2764.] In instructing the jury, the court stated that where evidence was received against one defendant but not as against another it could only be considered as against the defendant against whom it was permitted to be received. [Cl. Tr. p. 73; see also Cl. Tr. p. 195, Penalty Phase.]

9. Nature of the Defense.

Gilbert did not testify on the issue of guilt. He presented several witnesses who testified substantially to photographic matters including what pictures were shown witnesses at the savings and loan. [Rep. Tr. pp. 2103-17, 2188-95, 2197-2201.] As reflected in a discussion between court and counsel [Rep. Tr. p. 2207], one purpose of the defense was to indicate that certain things could not have been observed from where a witness was located at the savings and loan.

King took the stand and testified generally as in his statements summarized above. [Rep. Tr. p. 2366 *et seq.* especially Rep. Tr. pp. 2382-2415.]

The California Supreme Court noted that King's testimony was less damaging to Gilbert than King's statements (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372). In that connection, it may be observed that during the testimony of King's statements Gilbert was reported to have said that he would kill many more policemen before he was through, with reference to his having done some shooting. [Rep. Tr. pp. 1953-56.] When King was asked at the trial if Gilbert said anything as to what he had done relative to shooting, King did not repeat that portion of the statement as to killing many more policemen. [Rep. Tr. p. 2399; see also Rep. Tr. pp. 2641, 2643, 2675, 2721.]

The court instructed the jury that if King was found to be an accomplice in any of the crimes charged, his testimony must be corroborated as against Gilbert, and that his testimony as against Gilbert should be viewed with distrust. [Cl. Tr. p. 104.] Said instruction was reread in substance to the jury during the course of their deliberations and the court indicated it would be sent in with the jury. [Rep. Tr. p. 3299-A.]

10. Nature of the Penalty Phase.

To paraphrase the opinion of the California Supreme Court (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372), most of the People's evidence at the penalty phase of the trial was introduced to show facts in aggravation of Gilbert's penalty. This evidence disclosed that Gilbert was convicted in 1947 of second degree murder on a plea of guilty for killing a fellow prisoner while serving a term in San Quentin. [Rep. Tr. pp. 3703-04, 3713-16, 3843-44.] In 1959 he was released on parole and was convicted of burglary the following year. [Rep. Tr. pp. 3685-86, 3910-15, 3935.] In July 1963 he escaped from prison [Rep. Tr. pp. 3564-67, 3570], and committed a series of armed bank robberies, October 28, 1963 [Rep. Tr. pp. 3361-62, 3367-68], December 6, 1963 [Rep. Tr. pp. 3317, 3320, 3356-57], December 20, 1963 [Rep. Tr. pp. 3460, 3469-70], December 23, 1963 [Rep. Tr. pp. 3491, 3494-95, 3543], and December 31, 1963. [Rep. Tr. pp. 3736, 3743, 3754.]

Gilbert took the stand during the penalty phase. He explained that he acted defensively in the episode at San Quentin which resulted in his being charged with the murder of a fellow prisoner. [Rep. Tr. pp. 3947-48, 3957-58, 3960.] He denied committing the offenses charged in the case at bar, maintaining he was elsewhere. [Rep. Tr. pp. 3963-65.]

11. Particulars of the Eye Witness Identification Testimony at the Guilt and Penalty Phases.

The eye witness identification testimony was substantial. Seven witnesses testifying on the guilt phase in June, 1964 [Cl. Tr. pp. 25-28, 30], identified Gilbert in the courtroom as a participant in the robbery at the

Mutual Savings and Loan. [Butler, Rep. Tr. p. 48; Liechty, Rep. Tr. p. 202; Riddle, Rep. Tr. p. 286; Schuett, Rep. Tr. p. 455; Clark, Rep. Tr. p. 548; Horn, Rep. Tr. pp. 778-79; Espinosa, Rep. Tr. pp. 871, 874.]

The testimony of each of these identification eye witnesses reflected a definite opportunity on his or her part to observe Gilbert. [See Butler, Rep. Tr. pp. 45, 48, 64, 66, 128, 131; Liechty, Rep. Tr. pp. 201-02, 204, 206, 208, 264; Riddle, Rep. Tr. pp. 284-86, 293-95, 299-301, 305, 307, 309, 312, 329, 343, 391; Schuett, Rep. Tr. pp. 455-61, 463, 481, 510-11; Clark, Rep. Tr. pp. 548-53, 557; Horn, Rep. Tr. pp. 767, 772-76, 778, 787-91, 793-94, 796, 808; Espinosa, Rep. Tr. pp. 850-52, 854, 861-62, 870-71, 874, 879, 905.]

In the guilt phase there was no questioning of identification witnesses relative to photographs or the lineup until cross-examination. [See Butler, Rep. Tr. p. 141; Liechty, Rep. Tr. p. 233; Riddle, Rep. Tr. p. 349; Schuett, Rep. Tr. p. 485; Clark, Rep. Tr. p. 560; Horn, Rep. Tr. p. 803; Espinosa, Rep. Tr. p. 912.] It is submitted that the people were relying on the in-court identifications; and that there was ample opportunity to cross-examine the various witnesses relative to their identifications.

The testimony of Miss Butler is significant in connection with the procedures followed. She was shown a number of photographs the afternoon of the robbery. The authorities did not indicate that one of the photographs was that of the person they suspected of committing the offense. They just asked her to look at the pictures they had. [Rep. Tr. p. 145.] She was shown about five photographs in the first group of pictures that day about an hour and a half after the robbery.

They were little photographs. She saw in that group one of Gilbert and one of Weaver. [Rep. Tr. pp. 176-78.] The second group was shown her around 2:00 or 3:00 p.m. There were about ten in that group. She recognized in that group Gilbert's photograph and Weaver's. [Rep. Tr. pp. 178-80.] In no instance did any of the persons showing the photographs indicate which one or ones he wanted her to identify. [Rep. Tr. p. 180.] As she recalled the pictures in each group were the same size. [Rep. Tr. p. 187.]

She attended the lineup at the police building March 26, 1964. [Rep. Tr. pp. 142-43.] She was at the police building around 7:00 p.m. and was in an auditorium. There could have been a hundred people in the audience. She would say that eight or ten Caucasian men were brought in in a line. Questions were asked them and when they were asked to speak or answer they would be required to step forward. [Rep. Tr. pp. 147-50.] Some were asked when or where he was arrested and did he own an automoblie. Some were asked to describe the automobile. Gilbert was in the lineup. [Rep. Tr. pp. 150-52.] The men were on a stage. The lighting was bright on the stage and dark in the audience. Light was reflecting into the eyes of the people in the lineup; it would have been very difficult for them to look out into the audience. [Rep. Tr. p. 152.] Miss Butler was in the fifth row about 43 feet from the stage. [Rep. Tr. p. 153.] A moderator asked the questions. [Rep. Tr. pp. 156-57.] The men all left the stage together. [Rep. Tr. p. 161.] At the lineup no one told Miss Butler that Gilbert was No. 4 nor whom to identify of that group. [Rep. Tr. pp. 183-84.] She did not remember that the men were asked to identify themselves

by name. She did not recall hearing Gilbert mentioned by name there. [Rep. Tr. p. 188.]

During discussion on a motion to strike Miss Butler's testimony, the court made these observations:

> ". . . I am saying that she comes into the courtroom here, regardless if you hadn't any show-up here at all, she comes into the courtroom here and positively identifies this defendant." [Rep. Tr. p. 193.]
>
> "I would think, if I were in the robbery she was in, I would think I would have a pretty good idea who did it when I saw him in the courtroom, and I think she has." [Rep. Tr. p. 194.]

Mr. Liechty's testimony reflected essentially the same procedures in regard to photographs, *i.e.*, he was shown two groups the day of the robbery. The first group was around noon. They were different sizes. He selected a photograph of Gilbert from each group. [Rep. Tr. pp. 233-37.] He testified at a removal proceeding in Philadelphia March 11, 1964, and recognized Gilbert when he walked in the courtroom. [Rep. Tr. pp. 219-20, 278-79.]

Mrs. Riddle testified with respect to viewing the photographs that she was shown them about 4:00 p.m. the day of the robbery. [Rep. Tr. p. 337.] There were about 25 or 30 of various sizes. She recognized 2 or 3 as being of Gilbert. [Rep. Tr. p. 388.] No particular picture was designated to her. [Rep. Tr. p. 389.] Her testimony relative to the lineup tied in basically with that of Miss Butler. [Rep. Tr. pp. 349, 352-58.]

Miss Schuett saw photographs but did not make any positive identification. [Rep. Tr. p. 489.] She did not attend the lineup. [Rep. Tr. p. 490.]

Mr. Clark looked at photographs before noon the day of the robbery. He could not remember relative to looking at the photographs in the afternoon. He selected one photograph of Gilbert. [Rep. Tr. pp. 560-63.] He attended the proceedings in Philadelphia where he saw Gilbert in the courtroom; he also observed a photograph of Gilbert lying on the desk. [Rep. Tr. pp. 565-66, 590-91.]

Mr. Clark's testimony relative to the lineup tied in with that of Miss Butler. He related that he saw about 10 men at the lineup. He did not do anything before he went in the police building nor go any place before he entered the auditorium. The auditorium was darkened and light shone on the people on the stage. [Rep. Tr. pp. 566, 568.] The persons on the stage would be asked by an officer or moderator questions of this nature: "When were you arrested?" "Do you own an automobile?" "What is the make of your automobile?" [Rep. Tr. p. 571.] The men in the lineup were Caucasians. There were differences in ages and clothing of those Mr. Clark remembered. As Mr. Clark recalled, Gilbert was No. 7. As to whether any person removed any clothing, Mr. Clark recalled that one man, possibly No. 5, removed a jacket. [Rep. Tr. pp. 572-75, 577-78.]

Mrs. Horn saw photographs but did not identify a picture of Gilbert. She did not see Gilbert at any time from the robbery until she got into court. [Rep. Tr. p. 803.]

Mr. Espinosa related that the day of the robbery an officer showed some pictures at the witness' home; there were two of different men. One was a photographic sketch. As Mr. Espinosa recalled, he identified

a picture then of the other man involved. He was not positive as to the remaining picture. Subsequently, at school an officer showed him a picture which he identified as Gilbert's. [Rep. Tr. pp. 911-15.] He did not go to the lineup; he had not seen Gilbert from the time of the robbery until the day he (witness) was testifying. [Rep. Tr. p. 918.]

Of the preceding witnesses, the following appeared before the grand jury March 5, 1964: Butler [Rep. Tr. pp. 165, 185], Liechty [Rep. Tr. p. 258], Riddle [Rep. Tr. p. 348], and Clark [Rep. Tr. p. 563]. A photograph (or reproduction of one) which came from Gilbert's apartment was used at the grand jury. [Rep. Tr. pp. 378, 380-83.]

Eight witnesses testifying on the penalty phase in July, 1964 [Cl. Tr. pp. 165-67], identified Gilbert in the courtroom as a participant in various other robberies all prior to the Mutual Savings and Loan as aforenoted: [Mumblo, Rep. Tr. p. 3320; Asbury, Rep. Tr. pp. 3356-57; Pesqueira, Rep. Tr. pp. 3367-68; Waide, Rep. Tr. pp. 3469-70; Eoff, Rep. Tr. pp. 3494-95; St. Amant, Rep. Tr. p. 3543; Pingleton, Rep. Tr. p. 3743; Ramos, Rep. Tr. p. 3754.]

The testimony of each of these witnesses reflected a definite opportunity on his or her part to observe Gilbert. [See Mumblo, Rep. Tr. pp. 3319-23, 3421-25, 3427, 3431-32; Asbury, Rep. Tr. pp. 3356-57, 3435-41; Pesqueira, Rep. Tr. pp. 3363-68, 3381-86, 3388; Waide, Rep. Tr. pp. 3463, 3466-70, 3475-76, 3481; Eoff, Rep. Tr. pp. 3494-99, 3520-26; 3529-32; St. Amant, Rep. Tr. pp. 3542-46, 3557-60, 3562; Pingleton, Rep. Tr. pp. 3739-40, 3742-43, 3747; Ramos, Rep. Tr. pp. 3752-55, 3761.]

In the penalty phase, while there was reference to photographs and the lineup during direct examination, it was not until after the witnesses identified Gilbert in the courtroom. [See, Mumblo, Rep. Tr. p. 3330; Asbury, Rep. Tr. pp. 3358-59; Pesqueira, Rep. Tr. p. 3375; Waide, Rep. Tr. p. 3471; Eoff, Rep. Tr. p. 3501; St. Amant, Rep. Tr. p. 3549; Pingleton, Rep. Tr. p. 3743; Ramos, Rep. Tr. p. 3757.] It is submitted that the People were relying on the in-court identifications; and that there was ample opportunity to cross-examine the various witnesses relative to their identifications.

Relative to photographs, Mrs. Mumblo related that the authorities showed her some following the robbery at which she was present. She saw none that resembled Gilbert. At a later time she did. [Rep. Tr. pp. 3330-31.]

Mr. Asbury was shown photographs the same day as the robbery at which he was present. He was shown photographs about half a dozen times. He would be shown a number each time. [Rep. Tr. pp. 3357-58.] He did not recall making a photographic identification the day of the robbery. [Rep. Tr. p. 3451.] Around the middle of January 1964, he was shown a group of about 10 photographs. He identified some of Gilbert. [Rep. Tr. pp. 3451-54.]

The second day following the robbery at which she was present, Mrs. Pesqueira was shown a group of photographs. She was shown photographs again about six weeks prior to her testifying. [She was testifying July 21, 1964; Rep. Tr. p. 3300.] In the first group she saw none that resembled Gilbert. In the second group she did see one or more that resembled him.

[Rep. Tr. pp. 3375-77.] There may have been another time when she saw some photographs (*i.e.*, between the aforementioned times). On that occasion she identified one of Gilbert. [Rep. Tr. pp. 3400-02.]

Mrs. Waide was shown photographs subsequent to the robbery at which she was present. The pictures were always in groups. [Rep. Tr. pp. 3471-73.] After hearing of the savings and loan robbery in Alhambra, she saw Gilbert's picture on television; this was before she saw any mug shots or anything. [Rep. Tr. p. 3484.] On an occasion subsequently, she recognized two photographs of Gilbert from among 8 or 10. [Rep. Tr. pp. 3485-86.]

Mrs. Eoff was shown photographs and they would be in groups. She did not recall seeing Gilbert's photograph until after the Alhambra robbery, then she was shown some photographs in the group of Gilbert and the other two men with him (relative to the robbery at which she was present) and singular ones of Gilbert. [Rep. Tr. pp. 3501, 3506-08.]

Mr. St. Amant was initially shown photographs the first week in January, 1964. He was shown photographs 10 or 15 times and always in groups. On some occasions he saw a photo that resembled Gilbert. [Rep. Tr. pp. 3548-49.]

The day of the robbery at which he was present or a couple of days later, Mr. Pingleton was shown about four or five photographs of three different men. He noticed one of Gilbert. Thereafter he was shown additional photographs. There were three times altogether. The photographs were always in groups. On each occasion he noticed a photograph of Gilbert. [Rep. Tr. pp. 3743-44, 3748.]

Miss Ramos was shown at least five photographs the same day of the robbery at which she was present. Two were of Gilbert. She was shown photographs three times and in groups, and on each occasion she recognized one of Gilbert. [Rep. Tr. pp. 3755-56.]

The foregoing witnesses attended the lineup and observed Gilbert there. [Mumblo, Rep. Tr. pp. 3330-31; Asbury, Rep. Tr. pp. 3358, 3450; Pesqueira, Rep. Tr. pp. 3376-77; Waide, Rep. Tr. pp. 3471-73; Eoff, Rep. Tr. pp. 3509-10, 3512; St. Amant, Rep. Tr. pp. 3549-50; Pingleton, Rep. Tr. pp. 3744-45; Ramos, Rep. Tr. p. 3757.]

SUMMARY OF ARGUMENT.

A. Relative to King's statements implicating Gilbert (which the California Supreme Court, in advance of *Miranda v. Arizona*, 384 U.S. 436 (1966), found to be erroneously admitted), it may be observed that Gilbert and King had separate counsel at the trial and that no request for separate trials appears prior to the presentation of testimony. In arguing to the jury, the prosecuting attorney discounted King's story of being under any compulsion from acts of Gilbert. In his own testimony King acknowledged that he had the objective of pointing the finger of guilt at Gilbert and of relieving himself of as much onus as possible. Under such circumstances the jurors could easily differentiate between the gradations in evidence as to Gilbert and King, with appropriate instructions from the trial court. The trial court extensively admonished the jurors to limit testimony of King's statements to King's case alone. While King repeated much of his statements in his testimony, the court instructed the jury that as against

Gilbert, King's testimony must be corroborated and that it should be viewed with distrust. It is submitted that the factors found to provide the petitioner with adequate protection in *Delli Paoli v. United States,* 352 U.S. 232, 239 (1957) were present here, and in view of the massive evidence of guilt as to Gilbert no fundamental unfairness is shown from the admission of King's statements and testimony.

B. Relative to the officers' entering Gilbert's locked apartment in his absence, without a warrant of arrest or search, they were in fresh pursuit of a robber and killer. The wounded accomplice, Weaver, gave the officers a good lead. He named Gilbert and indicated Gilbert's address. The information as to the address was borne out. Since Gilbert had recently shot a police officer and fled the scene of the shooting still armed, the officers were justified in entering the premises where he resided, without demand or explanation (for the officers' peril might otherwise be increased; see *Ker v. California,* 374 U.S. 23, 39-41 (1963)), to arrest him or a confederate who might be therein. The F.B.I. had reason to believe three persons were involved in the offenses, and at least one might then be in the apartment. When the officers entered the apartment they searched for a person or hiding place for a person. Several objects were observed in plain view, including a small envelope with the name of a photo studio on it, which appeared to and in fact did contain photos. These photos (of Gilbert) were copies and were compared with a mug shot. It was appropriate to take these photos, to assist with identification (see *Caldwell v. United States,* 338 F. 2d 385, 387 (8th Cir. 1964), cert. denied 380 U.S. 984 (1965)), and have a reproduction shown witnesses

at the scene. The reproduction could very well confirm or disprove the validity of Weaver's lead and point the direction in which the officers should concentrate their energies to apprehend the escaped robber and killer. Further it is submitted that the relationship between the photographs and the impressive eye-witness testimony in the courtroom was so attenuated no fundamental unfairness is demonstrated. What the officers observed after entering the apartment justified their subsequently taking other objects in connection with the issuance of search warrants.

C. Relative to the absence of counsel at the police lineup, it must first be inquired whether the use of a lineup like the one in the case at bar is akin to the use of a defendant's own incriminating words. Historically and practically a lineup is not so akin (see *Schmerber v. California*, 384 U.S. 757, 763-764 (1966)), where as here it is used for identification purposes solely; *i.e.*, the suspect is required to exhibit himself and to speak for identification, and what he says is not used against him at the trial. The right to the assistance of counsel (see *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964)) is basically designed to safeguard the individual's privilege against self-incrimination. It is submitted that the individual is not entitled to have counsel present during identification activities such as the lineup here, which are not designed to elicit information from him to be used against him at the trial. (Thus, the circumstance that the lineup took place subsequent to the indictment is immaterial.) It is further submitted that a causal nexus is lacking between the lineup and the subsequent testimony of eye-witnesses, so that no fundamental unfairness is demonstrated in any event.

D. Relative to the absence of counsel when the handwriting exemplars were given, it may again be noted that the right to the assistance of counsel is basically designed to safeguard the individual's privilege against self-incrimination. The procurement of handwriting exemplars as in the case at bar is not akin to eliciting an essentially testimonial response. When an individual writes for identification, the privilege against self-incrimination does not inhere (see *Schmerber v. California,* 384 U.S. 757, 764), accordingly the right to the assistance of counsel is not violated. It may be observed that Gilbert nevertheless was advised of his right to counsel relative to making statements prior to his giving the exemplars. Following his arrest, Gilbert declined to talk about the offenses in question until he had the advice of counsel. Later that evening an F.B.I. agent informed Gilbert of his right not to say anything without advice from an attorney. Gilbert agreed to talk about robberies in Philadelphia in which a demand note had been used. On request, Gilbert voluntarily wrote the exemplars; the F.B.I. agent obtained them for the purpose of investigating the Philadelphia robberies. No deception or coercion is shown. Moreover, considering the massive evidence of guilt (and the fact that a handwriting specimen in Gilbert's name other than those in question was also used in comparison, relative to a diagram of the robbery scene), it is submitted that no fundamental unfairness is shown.

ARGUMENT.

I.

No Unfairness Resulted as to Gilbert From the Admission of King's Statements and Testimony, the Limiting Instructions Being Clear and Explicit.

It is urged that petitioner Gilbert's right to due process was violated by the introduction into evidence of defendant King's statements to the authorities and by King's testimony at the guilt phase of the trial. It is pointed out that King not merely incriminated himself but implicated Gilbert. (Brief for Petitioner, Argument, Point I.)

At the outset it may be observed that Gilbert and King had separate counsel at the trial and that no request for separate trials appears prior to the presentation of testimony. [Cl. Tr. pp. 11-25.]

It will be recalled, from the testimony of King's statements to the authorities, that King related his having stolen an automobile at Weaver's behest, and that he waited for Gilbert and Weaver (Statement of the case, *supra*, B, (8); [Rep. Tr. pp. 1940-41, 1950-51, 1963]); that after he returned with the wounded Weaver, Gilbert pointed a pistol against King's stomach and threatened to kill him unless he did what he was told [Rep. Tr. pp. 1952-53, 1963]; that Gilbert informed King of his killing a policeman and said he would kill a lot more before he was through [Rep. Tr. pp. 1953-56]; that when they were in the apartment Gilbert came toward King with a pillow, King heard a click and realized that a gun held underneath it had misfired; that King begged for his life and Gilbert told him he was not going to kill him and gave him

some money. [Rep. Tr. pp. 1957-61.] This testimony was presented near the close of the bulk of the People's testimony on the guilt phase. [See Rep. Tr. p. 2102.]

King took the stand at the guilt phase and testified generally as in his statements [see Rep. Tr. pp. 2382-2415]; however, as the California Supreme Court noted (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372), King's testimony was less damaging to Gilbert than King's statements. When King was asked at the trial if Gilbert said anything as to what he had done relative to shooting, King did not repeat that part of the statement as to killing many more policemen. [Rep. Tr. p. 2399; see also, Rep. Tr. pp. 2641-2643, 2675, 2721.]

In his argument to the jury on the guilt phase, the prosecuting attorney strongly discounted King's story of being under any compulsion from acts of Gilbert. [Rep. Tr. pp. 2971, 2973, 2975-82, 3220-21, 3225.] In fact, King acknowledged in his own testimony that he had the objective of pointing the finger of guilt at Gilbert and of relieving himself of as much onus as possible. [Rep. Tr. pp. 2775-76.]

In this posture of the case, we submit that the jurors could easily differentiate between the gradations in evidence as to Gilbert and King, under appropriate instructions. For example, Gilbert was overwhelmingly incriminated by the eye-witness testimony placing him at the scene of the savings and loan as a participant. (Statement of the Case, B, (11).) King's role emerged as that of an aider and abettor removed from the scene. The jury might well consider it likely that King was seeking to do just what he acknowledged in his testimony: point the finger of guilt at Gilbert and relieve himself of responsibility as much as possible.

The jurors would accordingly be receptive to instructions from the court that they should not consider King's statements to the authorities as against Gilbert and that they should view with distrust King's testimony implicating Gilbert.

Petitioner specifies that portion of the California Supreme Court's opinion indicative of error (but error short of prejudice) as to Gilbert from the admission of King's testimony. (63 Cal. 2d at pp. 701-702, 47 Cal. Rptr. at pp. 915-16, 408 P. 2d at pp. 371-72.) The California Supreme Court therein cited its previous decision in *People v. Aranda,* 63 Cal. 2d 518, 526-27, 47 Cal. Rptr. 353, 358, 407 P. 2d 265, 270 (1965), which held that while limiting instructions did not eliminate error as to one co-defendant when another co-defendant's confession implicating the former was erroneously admitted, ". . . The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him . . . preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant." (*Aranda* articulated judicially declared rules of practice for trial courts thenceforth to follow in California; *e.g.,* that if references implicating a co-defendant could not be effectively deleted from another co-defendant's extrajudicial statements, there should be a severance of trials or exclusion of the statements; 63 Cal. 2d at pp. 530-31, 47 Cal. Rptr. at pp. 360-61, 407 P. 2d at pp. 272-273.) This rationale of *Aranda,* to the effect that prejudice should not necessarily follow, accords with decisions of this court as will appear below.

At this juncture it might be asked how intrinsic was the error found in the admission of King's statements. The admission of King's statements and his testimony compelled thereby was adjudged reversible error as to King because the authorities had not advised him of his right to counsel and to remain silent before making statements to the authorities, as required by *People v. Dorado,* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), cert. denied, 381 U.S. 937, 946 (1965). (63 Cal. 2d at pp. 699-701, 47 Cal. Rptr. at pp. 914-15, 408 P. 2d at pp. 370-71.) These requirements are now embraced within those articulated by *Miranda v. Arizona,* 384 U.S. 436, 467-473 (1966). However, those requirements were not mandatory as to the states, prior to the date *Miranda* was decided, June 13, 1966. *Johnson v. New Jersey,* 384 U.S. 719, 734 (1966). Accordingly, a reversal as to King was not constitutionally compelled in the present case. In other words, the admission of King's statements and testimony was not aggravated by any intrinsic error.

The basic issue then is as stated in *Delli Paoli v. United States,* 352 U.S. 232, 239 (1957), substituting King's name for Whitley's:

> "The issue here is whether, under all the circumstances, the court's instructions to the jury provided petitioner with sufficient protection so that the admission of Whitley's confession, strictly limited to use against Whitley, constituted reversible error. The determination of this issue turns on whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them."
>
> *Delli Paoli v. United States,* 352 U.S. 232, 239 (1957).

The judgment in *Delli Paoli* was affirmed. The trial court therein gave a limiting instruction when a co-defendant's confession was admitted. Its substance was repeated several times during cross-examination of a government agent before whom the confession was made, and a similar admonition was included in the court's charge to the jury. The admonitions were clear. Among other factors were these: the role of each defendant in the conspiracy was easily understood; each defendant was represented by a separate attorney; a separate trial was not requested; and the particular confession was not introduced til the rest of the government's case was in, rendering it easier for the jury to consider the confession separately.

We urge that such factors were substantially present in the case at bar. The relevant admonitions and instructions were clear and explicit. During the period the testimony of King's extrajudicial statements was presented, the court gave these admonitions:

> "Obviously it wouldn't apply to the defendant Gilbert and whatever is said here, you are to draw absolutely no connection with the defendant Gilbert and disregard it insofar as the defendant Gilbert is concerned." [Rep. Tr. p. 1939.]
>
> ". . . I think, however, at this time, in view of the testimony of this witness, which he hasn't completed as yet, that I should inform you that this testimony is not binding on the defendant Gilbert in any way; it is completely hearsay as far as he is concerned. You are not to draw any inferences whatever from the testimony you have heard from this witness as to anything in connection with the defendant Gilbert." [Rep. Tr. pp. 1967-68.]

"Ladies and gentlemen, I want to admonish you again that all testimony of statements allegedly made by the defendant King are to have no bearing on the case as against the defendant Gilbert and you are not to draw any inferences from that testimony affecting Gilbert in any way. It is hearsay so far as he is concerned and not binding upon him in any way.

I cautioned you about that yesterday and you understand, I am sure, and will heed my admonition in that regard."

* * *

"Whatever affected King, what he said or did is not binding on the defendant Gilbert in any way." [Rep. Tr. p. 2131.]

Further admonitions of said import appear at Reporter's Transcript pages 2292, 2317 and 2764. During King's testimony, the court reiterated that anything said outside the presence of Gilbert was hearsay as to Gilbert. [Rep. Tr. p. 2367.]

In charging the jury at the close of the trial on the guilt phase, the court instructed that:

"Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against any other defendant." [Cl. Tr. p. 73. This instruction was also repeated at the close of the penalty phase; Cl. Tr. p. 195.]

"Where evidence has been received of a statement by one of the defendants after his arrest and

in the absence of his co-defendant, such statement can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against his co-defendant." [Cl. Tr. p. 73.]

"If you find that the crimes charged in the indictment or any of them were committed and if you further find that the defendant, ROBIN CHARLES KING, JR., was an accomplice as defined in these instructions in the commission of those crimes or any of them, then as against the co-defendant, JESSE GILBERT, his testimony must be corroborated as defined herein. Notwithstanding this rule, before you may convict either defendant, you must find that the evidence against him carries the convincing force required by law.

"In weighing the testimony of the defendant, ROBIN CHARLES KING, JR., as against his co-defendant, JESSE GILBERT, you ought to view it with distrust. This does not mean that you may arbitrarily disregard this testimony but you should give it the weight to which you find that it is entitled after examining it with care and caution and in the light of all the evidence in the case." [Cl. Tr. p. 104. The above instruction was also reread to the jury in substance during the course of their deliberations, and the court indicated it would be sent in with them; Rep. Tr. p. 3299-A.]

In light of the admonitions and instructions given herein (the presence of which distinguishes this case from *Anderson v. United States,* 318 U.S. 350, 356-57 (1942), cited by Petitioner), we urge that the fol-

lowing language is appropriate, substituting King's name for Hollifield's:

> ". . . The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. . . ."

Opper v. United States, 348 U.S. 84, 95 (1954).

See also,

United States v. Ball, 163 U.S. 662, 672 (1896);

Lutwak v. United States, 344 U.S. 604, 618-19 (1953);

Wong Sun v. United States, 371 U.S. 471, 490 (1963).

A probing precedent in favor of the joint trial as a general rule and against separate trials as a matter of right is found in *United States v. Marchant,* 12 Wheat. (25 U.S.) 480, 484 (1827), wherein Mr. Justice Story wrote for the Court:

> ". . . We have, therefore, in the present case, not merely the absence of any authority in favor of the matter of right, but the course of practice, and the general reasoning deducible from the prerogative of the crown against it; and lastly, a direct au-

thority, in times when the administration of criminal justice was unsuspected, on the very point.

"Such is the substance of the reasons which induce us to decide against the claim as a matter of right. In our opinion, it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence. . . ." *United States v. Marchant,* 12 Wheat. (25 U.S.), 480, 484 (1827).

We urge, in light of the authorities cited and on principle, that no violation of due process should be found necessarily to arise from a joint trial, relative to the admission of a co-defendant's statements, unless, for example, it shall appear that the trial court abused its discretion in denying a motion for severance or that the court insufficiently admonished the jury to limit incriminating statements of the declarant to his case only, when such statements would be hearsay as to the non-declarant co-defendant.

We submit that *Jackson v. Denno,* 378 U.S. 368, 388-89 (1964), does not require a contrary conclusion. *Jackson* expresses concern with the ability of a jury to evaluate a confession for its voluntariness, and concern with eliminating the risk that a jury might rely on an involuntary confession in determining a defendant's guilt. We submit that these concerns are different from the one herein: whether, in the posture of the case, the trial court's admonitions and instructions were sufficiently clear and explicit to protect Gilbert's rights and insure that the jury could and would appropriately limit King's statements.

In finding that there was no prejudice to Gilbert on the guilt phase from the admission of King's statements and testimony, the California Supreme Court, speaking through Mr. Chief Justice Traynor, stressed the instructions to the jury and the massive evidence of Gilbert's guilt. (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372.) [See Statement of the Case, B, (11), summarizing the eye-witness testimony identifying Gilbert as one of the robbers; *i.e.*, Rep. Tr. pp. 48, 202, 286, 455, 548, 778, 871; see also, Statement of the Case, B, (7), summarizing handwriting testimony linking Gilbert to a diagram of the savings and loan area found in a notebook in his apartment, *i.e.*, Rep. Tr. pp. 1858-59, 1861-63, 1890-92, 1922; see also, Rep. Tr. pp. 1414, 1484, 1920, 1928-29.] Relative to the penalty phase of the trial, the California Supreme Court observed that King's statements were not reintroduced nor did he testify, and that the prosecuting attorney did not comment on King's statements or testimony (in question herein) in arguing to the jury. The California Supreme Court also observed that most of the People's evidence at the penalty phase was introduced to show facts in aggravation of Gilbert's penalty, and that in the face of such facts and of the circumstances of the killing of Officer Davis, no prejudice resulted on the penalty phase from the admission of King's statements and testimony. We urge that the Court's rationale is persuasive.

For all the foregoing reasons we urge that no denial of due process resulted as to Gilbert from the admission of King's statements and testimony.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental

> fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. . . ."
>
> *Lisenba v. California,* 314 U.S. 219, 236 (1941).

The acts herein complained of were not of such quality.

II.

The Entry Into the Apartment and Taking of the Photographs Was Proper, Because the Officers Were in Hot Pursuit.

Petitioner Gilbert contends that his conviction stemmed from an unlawful search and seizure in that the officers, acting without a warrant of arrest or search, entered his locked apartment in his absence and took therefrom the envelope of small photographs, a reproduction of one photograph being shown witnesses at the trial and before the grand jury; and that other items were subsequently removed, although search warrants issued. (Brief for Petitioner, Argument, Point IV.)

Petitioner contends that there were no exigent circumstances or any reasonable belief anyone occupied the apartment, which would have justified entry therein.

It will be recalled that the authorities had apprehended one of the robbers, the wounded Weaver, who told them of Gilbert's complicity and indicated where he lived. The information as to Gilbert's address was borne out. [Statement of the Case, B, (3); Rep. Tr. pp. 1172-74, 1176-77, 1180, 1206-10, 1220-21.]

We submit that the authorities had probable cause to apprehend Gilbert (or a confederate) at Gilbert's apartment if Gilbert (or a confederate) should be there.

See:

Thomas v. United States, 281 F. 2d 132, 136 (8th Cir. 1960), cert. denied 364 U.S. 904 (1960).

See also,

Rodgers v. United States, 267 F. 2d 79, 84-89 (9th Cir. 1959);

Payne v. United States, 294 F. 2d 723, 725 (D.C. Cir. 1961), cert. denied 368 U.S. 883 (1961).

The circumstances legally justifying such apprehension for the state offenses in question were to be determined by the trial court, under California law insofar as that law accorded with the Federal Constitution.

Ker v. California, 374 U.S. 23, 32, 37 (1963).

To make an arrest in California, a peace officer may break open the door or window of the house in which the person to be arrested is, or where the officer has reasonable grounds to believe him to be, after demanding admittance and explaining the purpose; however, the demand and explanation are unnecessary if the officer's peril will be increased.

Ker v. California, 374 U.S. 23, 39-41;

People v. Maddox, 46 Cal. 2d 301, 306, 294 P. 2d 6, 9 (1956), cert. denied, 352 U.S. 858 (1956).

Since Gilbert had recently shot an officer and had fled the scene of the shooting still armed, the authorities

were justified in entering the premises where he resided, without demand or explanation, to arrest him if he should be there, or to arrest any confederate of Gilbert's reasonably believed to be in the apartment. We urge further that the authorities had the right to search without a warrant for that which would aid them in identifying and apprehending Gilbert. *Johnson v. United States,* 333 U.S. 10, 14-15 (1948) and *McDonald v. United States,* 335 U.S. 451, 454-56 (1948), reflect by way of comment that a search without a warrant may be justified when the exigencies of the situation make that course imperative (*e.g.*, the officers are responding to an emergency such as where the defendant is fleeing. While in the course of a proper search, the authorities are not required to blind themselves to significant evidence in plain sight.

> *People v. Roberts,* 47 Cal. 2d 374, 380, 303 P. 2d 721, 724 (1956).

See also,

> *Love v. United States,* 170 F. 2d 32, 33-34 (4th Cir. 1948), cert. denied 336 U.S. 912 (1949);
>
> *Paper v. United States,* 53 F. 2d 184-85 (4th Cir. 1937).

Indeed, to observe what is placed before an officer in full view does not constitute a search.

> *Ker v. California, supra,* 374 U.S. 23, 43.

It will be recalled that while Officer Nixon was in pursuit of the robbers, a man came up to him and told him two men had left a Pontiac and entered an Oldsmobile. Nixon communicated this over the radio. [Statement of the Case, B(1); Rep. Tr. pp. 1076-77,

1082.] He found Weaver wounded in still a third car. [Rep. Tr. pp. 1066, 1068, 1082.] Weaver was taken to the hospital and was seen there as early as 11:30 a.m. by F.B.I. Agent Norton. [Rep. Tr. pp. 32, 1412-15.] Weaver gave information as to Gilbert and the apartment, and Norton relayed it to the F.B.I. office. [Rep. Tr. pp. 1206-08.] Weaver told Norton that no other person was involved, but Norton did not know whether to believe this. In his conversations with his office, the office had indicated the possibility of another person. [Rep. Tr. pp. 1222-23.] F.B.I. Agent Keil arrived at the apartment about 1 p.m. in response to radio directions. The manager informed him that one of the occupants, Mr. Flood (Gilbert), had just left saying he was going to San Francisco. F.B.I. Agents Schlatter and Onsgard who had arrived were given the key. [Rep. Tr. pp. 1124, 1177-80.] Schlatter learned over the radio, en route to the apartment, that three persons were apparently involved, *i.e.*, the two men in the bank and a third in the getaway; that one of the three was wounded and had wrecked a car and that the other two had gotten away in another car. On arrival, Schlatter talked to Keil and received information that one of the occupants had just left. [Rep. Tr. pp. 1246-48.]

Mrs. Willner accompanied the F.B.I. agents to the apartment. She recalled that they told her to stand clear to a place of safety. [Rep. Tr. pp. 1165-66.] When Schlatter obtained the key to the apartment, his state of mind was as follows: The F.B.I. knew from information previously received that there were three robbers, that one was wounded and accounted for, that one had left just a few minutes before and that a third

one was unaccounted for and presumably in the apartment; it was also in his mind that one of the robbers had shot a police officer. [Rep. Tr. p. 1249.] When he took the key and started toward the particular apartment, his intention was as follows: the officers were going into a place where presumably a man was who had just participated in a bank robbery, and it was the intention of the officers to take him into custody; it was very much in his mind that the man might be armed; and he believed himself to be in hot pursuit of an individual in that apartment. [Rep. Tr. p. 1250.] He also thought it possible that Gilbert had told the landlady he was going to San Francisco, as a ruse, and that he might then be in the apartment or more possibly return in a half-hour. [Rep. Tr. p. 1281.] The officers searched for a person or a hiding place for a person, inside the apartment. They went into closets and looked under beds. In doing this, one or more officers saw several objects of manifest significance in open view including a notebook with a diagram of the savings and loan area, an Alpha Beta markets paper sack found to contain rolls of coins with the markings of the savings and loan, a clip from a .45 automatic, and photographs. [Rep. Tr. pp. 1250-58, 1301-03, 1305-08, 1320, 1336, 1370.]

More particularly, as to the photographs (which Petitioner stresses), F.B.I. Agent Crowley observed a small envelope lying on top of a dresser. The envelope had the name of a photo studio on it. It appeared to and did in fact contain photos, including People's Exhibit 46. [Rep. Tr. pp. 1182, 1437-38.] They were passport type photos, and were copies. People's 46 was compared with a "mug shot"; the group discussed the circum-

stance that it was of Gilbert. Crowley gave them to Schlatter; there were three or four. Schlatter told Keil to take them to the savings and loan and see if anyone there could recognize the person. Keil took them there and gave them to F.B.I. Agent La Jeunesse. [Rep. Tr. pp. 1181-83, 1255-56, 1259-60, 1266, 1301-03.] The latter had People's Exhibit 46 enlarged and reproduced and shown the witnesses. [Rep. Tr. pp. 1287-92, 1298.]

In light of the circumstances, we submit that the officers were justified in entering the apartment and taking the photographs without a search warrant. Except for the photographs, the objects were taken in connection with the issuance of search warrants. [Rep. Tr. pp. 1358-61, 1378-79, 1398-1402, 1482. The fingerprint lifts in the apartment were taken following the first search warrant; Rep. Tr. pp. 1310, 1329, 1343-44, 1633.]

We submit further that these statements of the trial judge are appropriate:

> ". . . [I]t is obvious that in investigations of this kind time is of the essence. There isn't any question in the Court's mind that at the time of the first entry here that these officers were, as the term is used, in hot pursuit of what I think reasonably would be considered a very good lead. One of the participants in the robbery had identified and linked the defendant Gilbert with the offense, and gave enough information that he was located, his place was located, the apartment was located within a matter of minutes, almost. In fact, they were in hot pursuit in a matter of seconds, almost. They were present on the premises

of this location and the defendant Gilbert was apparently present there when the first F.B.I. Agent arrived, so that is how hot the pursuit was.

"They had information at that time that there were probably three persons involved, and one of them for certain had been located, in the hospital, and they had reasonable ground to believe that they had located the second one; and a third one was still at large. And I think they would certainly be derelict in their duties if they walked away from this place to take an hour, or whatever it takes, to get a search warrant.

"I think they were definitely in hot pursuit at that time, and I think they were fully armed and went into the apartment with the idea of looking for someone, the third party, possibly. And, as indicated by one of the officers who testified, they had no assurance that Gilbert had left the premises, although he indicated that he was going to San Francisco. They are not bound by that. They don't have to take his word for that. That may be a ruse in order to throw whoever might be coming after them off scent. That is one of the possibilities.

"I think the first entry was perfectly legal. . . ." [Rep. Tr. pp. 1406-08.]

The California Supreme Court pertinently observed that

"'. . . the officers were in fresh pursuit of two robbers who escaped in the same automobile, ...The officers entered, not to make a general exploratory search to find evidence of guilt, but in fresh pursuit to search for a suspect and make an arrest.

A police officer had been shot, one suspect was escaping, and another suspect was likely to escape. Under these circumstances the officers were not required to demand entrance and announce their purpose . . ., for to do so might have alerted the suspect and increased the officers' peril. . . .

"The search in the present case is thus different from the search condemned in Stoner v. California, 376 U.S. 483. . . . In that case, two days after the robbery of a food market, police officers identified the defendant as one of the two robbers. Without a warrant, the officers went to the defendant's hotel where a clerk let them into his room. They had no reason to believe that the defendant was in his room, for his key was in his mailbox at the hotel desk. The officers were not in fresh pursuit of escaping robbers, and they therefore had no reason to believe that the accomplice was in defendant's room. Moreover, they had time to obtain a warrant. Accordingly, there were no exigent circumstances such as existed in the present case to justify the search.

"The search in the present case was also properly limited to and incident to the purpose of the officers' entry. While the officers were looking through the apartment for their suspect they could properly examine suspicious objects in plain sight. . . . Moreover, they could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit. Accordingly, the evidence obtained through the search was properly admitted." 63 Cal. 2d at p. 707, 47 Cal. Rptr. at p. 919, 408 P. 2d at p. 375.

The course followed by the authorities herein in entering Gilbert's apartment and taking the photographs is reminiscent of the obligations assumed in England, under the common law, by the conservators of the peace, who had

> ". . . authority to arrest felons and persons whom they had reasonable grounds to believe were perpetrators of a felony. Whenever a charge of felony was brought to their notice, supported by reasonable grounds of suspicion, they were required to apprehend the offenders, or at least to raise a hue and cry, under penalty of being indicted for neglect of duty. The right to dispense with warrants in these instances probably had its origin in the necessity of preventing the escape of offenders during the period of delay incident to procuring warrants if such formality had been required."
>
> 4 Anderson, Wharton's Crim. Law and Proc., Section 1595, page 242.

See also,

> 4 Blackstone, Commentaries on the Laws of England, pages 293-94 (Jones Ed., 1916, Vol. 2, Section 330, pages 2516-17.)

Reminiscent of hue and cry, *Caldwell v. United States,* 338 F. 2d 385 (8th Cir. 1964), cert. denied, 380 U.S. 984 (1965), deals with fresh pursuit following a bank robbery and taking into custody an object that will assist with identification. We believe that the circumstances therein are sufficiently analogous to those in the case at bar, and the reasoning of the court sufficiently persuasive to warrant our quoting,

at some length, the following excerpts from the court's opinion, at page 387:

"When the pursuing bank employees found the robber's getaway car, the keys were in the ignition and the overcoat in question was partly inside and partly outside the closed car door. FBI Agent Buckley was instructed to investigate the car and its contents. He arrived at the location of its abandonment approximately thirty minutes after the robbery. Agent Buckley, without a warrant, searched the car, removed the coat, and then transferred the car to a government garage within less than an hour after the bank was robbed and several hours before the defendant was apprehended and his identity confirmed by witnesses.

"The constitutional rights against illegal search and seizure as guaranteed by the Fourth Amendment must be zealously protected. However, it sometimes poses a difficult problem to determine whether these individual rights have been infringed or whether under the circumstances, the police have conducted a fair and reasonable investigation within constitutional bounds.

". . .

"In the instant case the suspected robber was still at large at the time of the alleged illegal search and capable of removing his escape vehicle across the nearby state line outside the jurisdiction of local authorities. The federal agents removed the overcoat and had the car towed to a government garage for further investigation in order to facilitate identity and apprehension of the escaping felon.

"Only those searches and seizures without a warrant that are deemed unreasonable fall within the Fourth Amendment's prohibition. . . . The expediency of the events following the crime justified the investigating officers' confiscation of the felon's clothing and car in order to swiftly determine his identity and thereby effectuate his capture before he could make good his escape or destroy other evidence of the crime."

Caldwell v. United States, supra, 338 F. 2d 385, 387.

(The court noted as a reason for holding the Fourth Amendment inapplicable, the circumstance that the coat was not discovered in a search nor taken by a seizure in the legal sense of the terms, *i.e.* the coat was found in plain sight abandoned in a public place. This, however, was articulated in terms of a further reason. Page 338.)

See also,

Gilbert v. United States, ... F. 2d .... (9th Cir.. Sept. 16, 1966, No. 19940; slip opinion, pp. 5-13).

In our case the authorities had received a lead from the wounded Weaver to the effect that his fleeing accomplice was Gilbert. The search for Gilbert or a confederate in Gilbert's apartment disclosed the envelope of photographs which were compared by the authorities with a "mug shot." The photographs, like the overcoat in *Caldwell,* were properly taken to assist in identification. A reproduction of one of the photographs, exhibited to witnesses that day at the savings and loan, could very well confirm or disprove the va-

lidity of Weaver's lead and point the direction in which the authorities should concentrate their energies to apprehend the escaped robber and killer. Clearly, time was of the essence, and its pressure justified the authorities entering the apartment and taking the photographs.

We urge, in any event, that there was no denial of a fair trial; in other words, no ". . . failure to observe that fundamental fairness essential to the very concept of justice. . . ." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Fairness was evident in the way photographs were displayed to the witnesses. Generally, photographs were shown in groups, and the authorities did not single out a particular picture and say to the witness, "This is the man who did it; do you identify him?" [Statement of the Case, *supra*, B(11); *e.g.*, Rep. Tr. p. 145.]

As militating against any prejudice, we refer to the substantial and impressive in-court identification testimony. (Statement of the Case, *supra*, B(11).)

It was not the photographs which caused the witnesses in question to materialize. Their being witnesses stemmed from their having been present at the scene of the offenses. Even if there had been some invalidity in the use of the photographs, we submit that the in-court identifications of these witnesses would be untainted. As Mr. Justice Holmes stated for the court in *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392 (1920), relative to the exclusionary rule:

> ". . . Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. . . ."

See also,

Costello v. United States, 365 U.S. 265, 280 (1961).

The following language in *Smith v. United States,* 324 F. 2d 879, 881-882 (D.C. Cir. 1963), cert. denied 377 U.S. 954 (1964), is persuasive, by analogy:

"Courts have gone a long way in suppressing evidence but no case as yet has held that a jury should be denied the testimony of an eyewitness to a crime because of the circumstances in which his existence and identity was learned. However, in our view, the relationship between the inadmissible confessions and Holman's testimony in the District Court months later is so attenuated that there is no rational basis for excluding it. . . .

". . . .

"[A] witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence."

Smith v. United States, supra, 324 F. 2d 879, 881-882.

(In footnote 3, p. 882, the court distinguished *Wong Sun v. United States*, 371 U.S. 471 (1963) as a case not involving the suppression of eyewitness testimony.)

In other words, the crucial evidence was the in-court identification, not a prior showing to a witness of a photograph asserted to be improperly obtained. As the trial judge remarked, relative to one of the eyewitnesses, "I would think, if I were in the robbery she was in, I would think I would have a pretty good idea who did it when I saw him in the courtroom, and I think she has." [Rep. Tr. p. 194.]

For the foregoing reasons, we submit that the actions of the authorities with respect to entering the apartment were proper, that the photographs were properly taken following said entry to assist with identification, that what the officers observed in open view justified their later taking other objects in connection with the issuance of search warrants, and that in no event is any fundamental unfairness disclosed.

III.

The Right to Counsel Did Not Apply to the Lineup, There Being No Violation of the Privilege Against Self-Incrimination.

Petitioner Gilbert complains that he was taken to a lineup and compelled to appear before witnesses, subsequent to the indictment, without notice, and that his counsel was not given an opportunity to be present, contrary to his right to the assistance of counsel. (Brief for Petitioner, Argument, Point II.)

As a corollary contention, he argues that there appeared no order authorizing his release from the County Jail for the purpose of being in the lineup. However,

as the California Supreme Court observed, the People were not required to establish such authorization as a foundation for the testimony of the witnesses who identified Gilbert; further, it was presumed official duty was regularly performed, and there was no compelling reason to adopt an exclusionary rule to enforce compliance with a statute relative to custody of prisoners in jail. (63 Cal. 2d at p. 708, 47 Cal. Rptr. at p. 920, 408 P. 2d at p. 376, footnote 7.)

Petitioner argues that the procedures followed herein, being post-indictment, were vulnerable under *Massiah v. United States,* 377 U.S. 201 (1964). If they were vulnerable under *Massiah,* then they were also vulnerable under *Escobedo v. Illinois,* 378 U.S. 478 (1964). *Escobedo* reflects (pp. 484-85) that if there has in fact been a denial of the right to the assistance of counsel, it is no less a denial because it occurs before rather than after the indictment. Petitioner's argument therefore presents for consideration, as our initial inquiry, the intrinsic nature of the lineup. Since *Escobedo* (378 U.S. at p. 484) and *Massiah* (377 U.S. at p. 206) concern the applicability of constitutional guaranties when a defendant's own incriminating words are used against him at the trial, is a lineup, such as the one in the case at bar, synonymous with the use of a defendant's own incriminating words?

Smith v. United States, 187 F. 2d 192 (D.C. Cir. 1950), cert. denied 341 U.S. 927 (1951), reflects a negative answer. In determining there was no viola-

tion therein of the privilege against self-incrimination, the court at page 198 quoted the following language from *Ross v. State,* 204 Ind. 281, 291-292, 182 N.E. 865, 868 (1932):

> "'. . . We do not think that the rule against compulsory self-incrimination properly applies to pretrial efforts to identify a suspect as the probable perpetrator of a crime even though these efforts involve physical examination or observation of the suspect against his will. . . .'"

8 Wigmore, *Evidence,* Sections 2263, 2265, pages 378, 386 (McNaughton rev. 1961), states that the privilege against self-incrimination, historically, was directed at the employment of legal process to extract from a person's own lips an admission of guilt, and that "Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

Schmerber v. California, 384 U.S. 757, 763-764 (1966) states:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States,* 116 U.S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or *speak* for

identification, to appear in court, to stand, *to assume a stance, to walk,* or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

"Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. . . ." (Emphasis added.)

Schmerber v. California, 384 U.S. 757, 763-764.

We submit that a lineup such as the one involved in the case at bar (Statement of the Case, B, (11)), is not directed to "eliciting responses which are essentially testimonial."

Of the seven witnesses who identified Gilbert during the guilt phase as one of the robbers, Miss Butler [Rep. Tr. p. 142], Mrs. Riddle [Rep. Tr. p. 349], and Mr. Clark [Rep. Tr. p. 566], related having attended the lineup. Petitioner notes that Mrs. Willner, who rented the apartment to Gilbert, was also at the lineup [Rep. Tr. pp. 1140, 1168]; however, like the eye-witnesses who identified Gilbert as one of the robbers, her initial identification testimony pertained to Gilbert in the courtroom. [Rep. Tr. pp. 1123-24.] The eight witnesses

who identified Gilbert as a participant in other robberies, during the penalty phase, related having attended the lineup [Rep. Tr. pp. 3330, 3358, 3376, 3472, 3509, 3549, 3745, 3757.]

Gilbert was indicted March 10, 1964. At the time, he had not been returned from Philadelphia. It appears that he was returned March 16. [Cl. Tr. p. 1; Rep. Tr. pp. 1676, 1682, 1696-97.] Counsel was appointed the day of his arraignment March 18, and new counsel was substituted in on March 24. [Cl. Tr. pp. 13-14.] The lineup took place March 26. [Rep. Tr. pp. 2197-98.] (Plea was entered April 16, following disposition of a motion. [Cl. Tr. p. 17.]) We submit that the lineup was not held an undue time after Gilbert's availability in California. That the lineup procedure was eminently fair is reflected in the following testimony.

Miss Butler related that she went to the police building around 7 p.m. March 26; she was in an auditorium; there could have been a hundred people in the auditorium; she would say that eight or ten Caucasian men were brought in in a line; questions were asked them and when they were asked to speak or answer they would be required to step forward [Rep. Tr. pp. 142-43, 147-50]; some were asked when or where he was arrested and did he own an automobile; some were asked to describe the automobile; Gilbert was in the lineup [Rep. Tr. pp. 150-52]; the men were on a stage; the lighting was bright on the stage and dark in the audience; light was reflecting into the eyes of those in the lineup, it would have been very difficult for them to look out into the audience [Rep. Tr. p. 152]; a moderator asked the questions [Rep. Tr. pp. 156-57]; the men all left the stage together [Rep. Tr. p. 161]; no one

told Miss Butler whom to identify of the group; she did not remember that the men were asked to identify themselves by name nor did she recall Gilbert mentioned by name. [Rep. Tr. pp. 183-84, 188.]

Mr. Clark related that he saw about ten men at the lineup; he did not do anything before he went in the police building, nor go any place before he entered the auditorium; the auditorium was darkened and light shone on the people on the stage [Rep. Tr. pp. 566, 568]; the men on stage would be asked by an officer or moderator questions of this nature: "When were you arrested?" "Do you own an automobile?" "What is the make of your automobile?" [Rep. Tr. p. 571.] Mr. Clark further testified that the men in the lineup were Caucasians; there were differences in ages and clothing of those he remembered; as he recalled Gilbert was No. 7; as to whether any person removed any clothing, he recalled that one man, possibly No. 5, removed a jacket. [Rep. Tr. pp. 572-75, 577-78.]

It is evident from the foregoing that the participants in the lineup were not required to do anything more than exhibit themselves and talk for identification.[2]

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[2]From our perusal of the record it does not appear that the men in the lineup were asked to speak beyond the tenor of the matter reflected in the excerpts above. However, the opinion in *Gilbert v. United States*, ... F. 2d .... (9th Cir., Sept. 16, 1966, No. 19940) is indicative of further matter. *Gilbert v. United States, supra,* concerns a federal prosecution for four bank robberies, not including the Mutual Savings and Loan Association in Alhambra. The same lineup as herein involved is discussed. (Slip opinion, pp. 15-16, 30; see also, pp. 43-44, dissent.) The court notes evidence to the effect that the men were asked where they lived and whether they were armed when arrested, and that they were asked to repeat, in a soft and in a loud voice, certain phrases which witnesses heard the robbers use; also that they were required to put on or remove certain articles of clothing;

(This footnote is continued on the next page)

They were not required to incriminate themselves. This being the case, the right to the assistance of counsel did not inhere. Said right is basically designed to safeguard the individual's privilege against self-incrimination. As stated in *Escobedo v. Illinois*, 378 U.S. 478, 488-(1964):

> ". . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . ."

See also,

Schmerber v. California, 384 U.S. 757, 765-766.

A persuasive parallel to the situation in the case at bar is presented by *People v. Lopez*, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P. 2d 16, cert. denied 375 U.S. 994 (1964). In *Lopez* the defendants argued that they were prejudiced because the police did not allow their counsel to attend a show-up or line-up at which certain witnesses to the particular robbery identified them. The line-up related to the case at issue and others. It was urged that the procedure deprived them of their right to coun-

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that Gilbert and several others remained for a period; and that the witnesses called out in one another's presence the numbers of the men they could identify. We submit that such further circumstances do not detract from our argument. While petitioner might contend that more cooperation was required from him personally in speaking the particular phrases than in any other respect, and that in effect he was representing the use of his normal voice, still he was not required to do anything testimonial that was used against him at the trial. Assuredly, his voice was an essential physical characteristic. It follows that he was doing no more nor less than offering himself for personal notice when he repeated phrases that did not impart what he knew about the events at the Mutual Savings and Loan. We urge then that even under the additional circumstances reflected by *Gilbert v. United States, supra*, the lineup herein was designed fundamentally for purpose of identification, not incrimination.

sel at all stages of the proceedings, and that the privilege against self-incrimination was infringed. The lineup occurred after the filing of the complaint and after the arraignment, but before the preliminary examination. It was held in an auditorium in which the audience had a clear view of the stage but in which some screening made it difficult for those on stage to see the audience. The persons in the lineup would sometimes speak in response to questions of the officer in charge; both defendants spoke. There was no direct oral communication between suspects and spectators. (60 Cal. 2d at p. 241, 32 Cal. Rptr. at p. 434, 384 P. 2d at p. 26.)

The court indicated that the rights of an accused to counsel in the pretrial stages were granted principally to insure early representation and adequate trial preparation, and that they should not be construed in a way that would hamper legitimate investigation by the police when no substantial right of an accused was involved.

The court went on to observe:

> ". . . We do not believe that the accused has a right to have counsel present during purely investigatory activities which are not designed to elicit information from the accused or otherwise impinge upon his constitutional rights. The subject show-up was designed to aid the police with identification of the more robbers whoever they might be, with the elimination of persons possibly mistakenly suspected, and with the selection of witnesses; it was not intended to elicit information from the defendants or to have them do anything that would destroy their privilege against self-incrimination. There was no denial of due process in

refusing counsel's request to attend this show-up. The competency of the eye-witnesses of the more robbery to testify at the trial was not affected by their observation of defendants at the show-up without the attendance of defendants' counsel.

"Lopez's specific contention that during the show-up defendants' privilege against self-incrimination was violated is manifestly untenable. There is no indication, on the record before us, that defendants made or were asked to make any statements that would tend to incriminate them. The privilege extends only to testimonial compulsion; requiring defendants to assume a certain pose for purposes of identification, or to speak for voice identification, is not within the privilege. . . . Even in the courtroom during trial a defendant may be required to stand and remove a visor so that witnesses attempting to identify him (or, presumptively exonerate him) may have an unobstructed view of his features. . . ."

People v. Lopez, 60 Cal. 2d 223, 243-44, 32 Cal. Rptr. 424, 435-436, 384 P. 2d 16, 27-28.

Taking note of its holding in *Lopez,* the California Supreme Court in the case at bar said:

". . . Since the privilege against self-incrimination does not exempt the accused from appearing for the purpose of identification, no substantial right is infringed by the show-up. The principle of the *Lopez* case has not been impaired by Escobedo v. Illinois, 378 U.S. 478. Although requiring a defendant to appear in a show-up after his indictment cannot be considered a mere investiga-

tory procedure, the defendant is not prejudiced by the absence of counsel so long as the show-up is not designed to elicit information from him or impair his privilege against self-incrimination. . . ." (63 Cal. 2d at p. 709, 47 Cal. Rptr. at p. 920, 408 P. 2d at p. 376.)

See also *Kennedy v. United States,* 353 F. 2d 462 (D.C. Cir. 1965), wherein it was said at page 466:

". . . The absence of counsel at the time of the confrontation at the scene of the crime did not deprive Appellant of a right to silence, a right to withhold evidence or any other right which could have been effectively asserted had counsel been present."

See also,

Williams v. United States, 345 F. 2d 733, 734 (D.C. Cir. 1965), cert. denied 382 U.S. 962 (1965);

Gilbert v. United States, ... F. 2d ..... (9th Cir. Sept. 16, 1966, No. 19940) (slip opinion pp. 13-34).

Petitioner refers to *Wade v. United States,* 358 F. 2d 557, 558-60 (5th Cir. 1966), cert. granted, 35 U.S.L. Week. 3124 (U.S. Oct. 10, 1966) (No. 334). It was held therein that a lineup in the absence of counsel was vulnerable, and that the evidence of the identification witnesses "following the occurrence that we have held to have violated Wade's rights" must be omitted at a retrial. (In *Wade* it appeared that the lineup took place as long as six months after the occurrence, and the defendant was seen separately by the witnesses alone before the lineup.) *Wade* is contrary to the position

we urge based on cases such as *Lopez*. It may be noted that the *Wade* holding was predicated (358 F. 2d at p. 559) on the views of the dissenting judges in *United States ex rel. Stovall v. Denno*, 355 F. 2d 731 (1996), cert. granted, 384 U.S. 1000 (June 20, 1966) (No. 1565, Misc., 1965 Term; renumbered No. 254, 1966 Term (35 U.S.L. Week 3050).) The dissenting judges in *Stovall* (*i.e.*, 355 F. 2d at p. 745, first dissenting opinion) would merely have required the exclusion of evidence as to out-of-court identification, in a retrial; they would not have prohibited the particular witness from making an in-court identification. The majority opinion in *Stovall* accords with the authority on which we rely. While the *Wade* court indicated (358 F. 2d at p. 560) that if counsel was present he could caution the accused to remain silent, the court in *Stovall* indicated (355 F. 2d at p. 739) that counsel could not prevent the police from proceeding with identification activities. As was observed in the concurring opinion in *Stovall*, footnote 1, page 740:

> ". . . Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g., the privilege against self-incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved. . . ."

By way of obviating any prejudice, what was said in *Payne v. United States*, 294 F. 2d 723, 727 (D.C. Cir. 1961), cert. denied, 368 U.S. 883 (1961), is pertinent:

> ". . . The consequence of accepting appellant's contention in the present situation would be that

> Warren would be forever precluded from testifying against Payne in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. . . ."

While in *Payne* the point in issue was an illegal detention rather than the absence of counsel, we submit that the language quoted above applies by analogy. Also noteworthy is the following language from the concurring opinion in *Williams v. United States,* 345 F. 2d 733, 736 (D.C. Cir. 1965):

> ". . . Even if the line-up in the instant case, while appellant was without counsel, is somehow to be construed into a 'primary illegality' under Escobedo, we would be unable to find a causal nexus between the line-up and the subsequent testimony; and such a connection is necessary for exclusion. . . ."

For the foregoing reasons we urge that the right to counsel did not apply to the lineup. In any event, considering the abundant evidence of guilt including the courtroom identification testimony, we urge that fundamental fairness was preserved.

IV.

Gilbert's Right to Counsel Was Not Violated by His Giving Handwriting Exemplars, Since There Was No Violation of His Privilege Against Self-Incrimination.

It is urged that petitioner Gilbert was denied the right to the assistance of counsel in that handwriting exemplars were taken from him after a prior request for the presence of counsel, and in effect that he should have been first warned the exemplars could be used against him in the trial in California. (Br. for Petitioner, Argument, Point III.)

Before we turn to the factual background, some general observations with respect to handwriting exemplars appear appropriate.

We urge that if a handwriting exemplar is voluntarily given, constitutional requirements are met. The right to the assistance of counsel is basically designed to safeguard the individual's privilege against self-incrimination. Again, as stated in *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964):

> ". . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . ."

See also,

Schmerber v. California, 384 U.S. 757, 765-766 (1966).

If the giving of handwriting exemplars is outside the privilege against self-incrimination, then there is no requirement for the assistance of counsel, nor as a consequence for the cautions required since the decision in

Miranda v. Arizona, 384 U.S. 436, 467-473 (1966). In *Schmerber v. California, supra*, at pp. 763-764, the court said, relative to the privilege against self-incrimination, that it reaches communications of an accused in whatever form, and the compulsion of responses that are also communications:

> ". . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion . . . to *write* . . . for identification, . . ." (Emphasis added; p. 764, *id.*)

The court in *Schmerber* noted the emergence of a distinction, that the privilege is a bar against compelling testimony or communications but not as to making the accused the source of real or physical evidence. The distinction was characterized as a "helpful framework for analysis," but the court indicated it was not necesarily in agreement with all past applications thereof, referring to lie detector tests which may be directed toward eliciting essentially testimonial responses.

In conjunction with our belief that we are not herein dealing with eliciting testimonial responses, may we call attention to McCormick on Evidence, Section 126, pages 263-65 (1954), wherein the author takes note of the view that the privilege protects only testimonial compulsion in the sense of giving testimony and of producing documents and other objects in court; and that in jurisdictions following this view the privilege is not violated when the accused is, *inter alia*, required to give a specimen of his handwriting. The author observes, ". . . This view most nearly achieves the aim of holding the privilege within limits which will enable law enforcement officers to perform their tasks without unreasonable obstruction." *Id.* p. 265.

We submit that the following language in *People v. Harper,* 115 Cal. App. 2d 776, 779, 252 P. 2d 950, 952, presents a persuasive rationale for viewing handwriting exemplars as outside the privilege against self-incrimination:

> ". . . Defendants rely upon the privilege against self-incrimination contained in the Constitution of California (art. I, § 13) and in the Fifth Amendment to the Constitution of the United States. Defendants, however, do not come within the protection of those constitutional guaranties since they only protect a person from any unwilling testimonial disclosures, and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an exemplar of his handwriting. The protection extends only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. There was no 'testimonial compulsion' here. Defendants were not required to verify the authenticity of their handwriting on the exemplars. This was provided by a witness who saw them fill out the exemplars. Defendants were not compelled to disclose that the writing on the betting markers was theirs. This was proved by a handwriting expert. There is here no reliance to be placed upon any statement made by either of the defendants. The evidence was their handwriting, a physical fact which was compared with the handwriting on the betting markers and found to be the same. . . ."
>
> *People v. Harper,* 115 Cal. App. 2d 776, 779, 252 P. 2d 950, 952.

Harper is cited in footnote 4, *Bryant v. United States,* 244 F. 2d 411, 412 (5th Cir. 1957), relative to assuming ". . . the doubtful proposition that taking a specimen of handwriting from appellant can be the basis of a valid claim that she was compelled to be a witness against herself. . . ." The court in *Bryant* concluded that it was not essential to the admissibility of handwriting specimens that the defendant should have been first warned that they might be used against her in a criminal case, provided the specimens were voluntarily and understandingly furnished.

We urge that they were so furnished by Gilbert in the case at bar. The essential facts, together with the conclusions of the California Supreme Court, are reflected in the following excerpt from the court's opinion, with references to the Reporter's Transcript inserted in brackets by respondent:

> "He contends that handwriting exemplars were obtained from him by deceit and in the absence of counsel in violation of the principles of Escobedo v. Illinois, 378 U.S. 478, and that the exemplars were erroneously admitted at the trial along with testimony based upon them by an expert who identified Gilbert's handwriting on the bank area drawing found in his apartment. Since we agree with the Attorney General's contention that Gilbert waived any rights that he might have had before he made the exemplars, we need not decide whether handwriting exemplars are properly within the rule of Escobedo v. Illinois, supra. We also agree that there is no evidence of improper deception by the authorities.

"F.B.I. Agent Dean arrested Gilbert in Philadelphia on February 26, 1964. When Dean attempted to interrogate Gilbert about the Alhambra bank robbery, Gilbert refused to talk until he obtained the advice of counsel. [Rep. Tr. pp. 1548-51, 1577-78, 1675, 1860.] Later that day, agent Shanahan interviewed Gilbert. Shanahan told him that he was not required to say anything without advice from an attorney and that any statement he made might be used against him. [Rep. Tr. pp. 1823-24, 1830, 1836.] Gilbert agreed to talk about anything except the California robbery. Shanahan interrogated Gilbert about robberies in Philadelphia in which a demand note had been used and he asked Gilbert for a sample of his handprinting. Gilbert voluntarily wrote some exemplars. [Rep. Tr. pp. 1830-32, 1833-34, 1836-37.] Shanahan testified that he obtained those exemplars for the purpose of investigating the Philadelphia robberies and that they were thereafter filed by the F.B.I. in the same manner as fingerprints. He did not tell Gilbert that the exemplars would not be used in any other investigation. [Rep. Tr. pp. 1830-32, 1835, 1839.] Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief." (63 Cal. 2d at p. 708, 47 Cal. Rptr. at p. 920, 408 P. 2d at p. 376.)

In a subsequent decision, *People v. Graves*, 64 A.C. 216, 49 Cal. Rptr. 386, 411 P. 2d 114 (1966), cert. denied, 35 U.S. L. Week. 3129 (U.S. Oct. 10, 1966) (No. 464, Misc.), (cited in footnote 8, *Schmerber v. California*, 384 U.S. 757, 764), the California Su-

preme Court determined that the right to counsel during police interrogation established in *Escobedo v. Illinois,* 378 U.S. 478, does not protect a defendant from revealing evidence against himself by giving handwriting exemplars. The court pertinently said:

> "In *Escobedo,* the court found a remedy in the Sixth Amendment right to counsel for the abuses it deemed inherent in inquisitorial methods. There is nothing in the language or the logic of *Escobedo,* however, to indicate that this remedy is needed if the police have not carried out a process of interrogation that lends itself to eliciting incriminating statements. Accordingly, we find no support in *Escobedo* for invoking the right to counsel to block scientific crime investigation. Reliance on handwriting exemplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation. To preclude the police from asking for such exemplars would foster reliance instead on the very inquisitorial methods of law enforcement that *Escobedo* deems suspect." (64 A.C. at pp. 218-219, 49 Cal. Rptr. at pp. 387-388, 411 P. 2d at 115-116.)

The court in footnote 2 called attention to this language in the Report of the President's Commission on the Assassination of President Kennedy, pages 567-68 (1964):

> "Handwriting identification is based upon the principle that every person's handwriting is distinctive. . . . The possibility that one person could imitate the handwriting of another and successfully deceive an expert document examiner is very remote."

Since a specimen of handwriting is real or physical evidence outside the privilege against self-incrimination, since the right to counsel does not apply to giving a handwriting specimen, and since additionally the handwriting specimens in question were given without coercion, Gilbert's constitutional guaranties were not infringed.

In light of petitioner's argument relative to fundamental fairness, we submit these further observations. It is of course true that Gilbert's giving the exemplars required a certain measure of cooperation from him, yet no more surely than was required in his stepping forward or speaking for identification at the lineup. In other words, he was simply participating in identification procedures. He was not asked if he would copy the matter that appeared on the diagram found in the notebook in his apartment, for the inquiry concerned demand notes in Philadelphia. In his own testimony on the issue of admissibility (outside the presence of the jury), Gilbert said that he told Shanahan he did not wish to talk about robberies on the West Coast unless he had counsel present, but that he would be glad to cooperate if the matter only involved Philadelphia, since he did not want someone who was guilty to get away. [Rep. Tr. pp. 1843-1844.] Shanahan himself testified that he had no information the exemplars were to be used susbsequently in Los Angeles. [Rep. Tr. pp. 1833-1834.] It was F.B.I. policy, however, to secure

samples of hand printing of all suspects in bank robberies to compare with samples on file in Washington. The samples were kept for further reference; it was in the same category as taking fingerprints and keeping the fingerprints on file. [Rep. Tr. p. 1839.] It is evident from the circumstances heretofore summarized that Gilbert voluntarily and understandingly agreed to talk with Shanahan, that Shanahan talked with Gilbert in good faith and that Shanahan employed no subterfuge or coercion in procuring the exemplars. It is submitted that the F.B.I. policy relative to exemplars is a salutary one nationally. We urge then that the exemplars were no more immune from use in the case at bar than an utterance by Gilbert in the course of his conversation with Shanahan had that utterance proved relevant to this case. Thus, there is shown no conduct on the part of the authorities which offends the conscience nor infringes any right or privilege the accused is entitled to assert.

In any event, considering the massive evidence against Gilbert [*e.g.*, eye-witness testimony, Statement of the Case, B(11); see also, evidence that a handwriting specimen in Gilbert's name (Peo. Ex. 75), other than those in question, was also used in comparison; Statement of the Case, B(7); Rep. Tr. pp. 1861-63, 1874, 1878-83, 1890-92, 2346], we urge that fundamental fairness prevailed.

Conclusion.

Since no unfairness resulted as to Gilbert from the admission of King's statements and testimony, since the entry into the apartment and taking of photographs and other items was proper, and since the right to counsel did not apply to the lineup nor to the giving of handwriting exemplars, it is requested that the judgments of conviction as to Gilbert, pending before this Honorable Court, be affirmed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 223

JESSE JAMES GILBERT,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. Petitioner Was Deprived of the Due Process of Law Under the Fifth and Fourteenth Amendments of the United States Constitution When the Trial Court Permitted the Jury to Hear the Out-of-Court Declarations of Co-Defendant King Which Extensively Recited Petitioner's Participation in Murder, Robbery and Kidnaping.

This Court has granted certiorari to either reconsider the 5 to 4 *Delli Paoli* decision 352 U.S. 232 (1957)) or to consider its import and limitations. cf. *United States* v. *Bozza*, 365 F. 2d 206, 216-7 (2nd Cir. 1966); *Greenwell* v. *United States*, 336 F. 2d 962 (D.C. Cir. 1964).

In our opening brief we pointed out that under the circumstances of this case it was far more difficult for the jury to segregate the co-defendant King's extra-judicial statement and limit it to him than it was for the jury to pass on the issue of voluntariness in *Jackson* v. *Denno,* 378 U.S. 368 (1964) as separate and distinct from and preliminary to a determination of guilt or innocence. Respondent resignedly concedes the erosion of *Delli Paoli* although he maintains that in this case the Court carefully instructed the jury to not consider King's out-of-court statements against Gilbert and concludes that the jury must have followed the law given them by his Honor.

As a matter of fact, respondent in seeking to minimize King's out-of-court declarations merely accentuates the devastating impact they must have had. Not only did King mention Gilbert's name some 159 times (Pet. Op. Br. p. 8) and describe in detail the robbery and killing using Gilbert's name (ibid) but his hearsay statement also recited to the jury that after the killing Gilbert bragged of killing a policeman and promised to kill more. (R.T. 1953-56; Resp. Br. 37) He then attempted to kill King, the co-defendant, and was unsuccessful. (Resp. Br. 37-38) Certainly this made Gilbert out as a most dangerous societal menace.

The respondent argues that even though this devastating evidence was introduced via King's extra-judicial declarations alone (he did not so testify) (Resp. Br. p. 38) that this testimony was not repeated on the death penalty phase of the case. While this is true, it is crucial to point out that the same jury which determined the death penalty deliberated on the question of guilt or innocence and consequently was most mindful of Gilbert's alleged dangerous propensities. (Calif. Sup. Ct. Op. 47 Cal. Rptr. at 922)

As a matter of fact, if we were to consider only the rest of the evidence and the part of King's statement regarding Gilbert's participation in the bank robbery it is quite conceivable that the jurors, who are given a wide latitude in the determination of penalty in California, see Cal. Pen. Code 1190, would have felt that no matter how much of a confirmed robber Gilbert might be the killing arose out of a unique situation wherein he was trapped and felt that either he or the police officer had to go. In the other robberies neither police officers nor victims were brutalized. But with Gilbert's life hanging in the balance the jury had indelibly imprinted in its mind King's statements concerning Gilbert's accomplishment in killing a police officer and promising to kill more. The import of these statements is undeniable.

The lower Federal courts have often reversed cases wherein the co-defendant's extra-judicial declarations have been admitted into evidence and reasonably viewed must have damaged the defendant. See *Schaffer* v. *United States,* 221 F. 2d 17 (5th Cir. 1955); *Barton* v. *United States,* 263 F. 2d 894 (5th Cir. 1959); *United States* v. *Bozza,* 365 F. 2d 206 (2nd Cir. 1966). *Greenwell* v. *United States,* 336 F. 2d 962 (D.C. Cir. 1964) (Deletion of defendant's name not enough to cure the defect). In fact, the amendment to Rule 14 of the Federal Rules of Criminal Procedure which was adopted in July, 1966 was premised upon the impossibility of two being jointly and fairly tried where one of the parties gives out-of-court hearsay statements which seriously incriminate the other. See Annot. to 18 U.S.C. Rule 14.

The respondent argues that the evidence against Gilbert was overwhelming notwithstanding the declarations of King. However, in view of the elaborate statements re-

ferred to in both the opening brief and here and the "cop-killer" description of Gilbert it is indeed an understatement to say that the hearsay account of King "might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. 85 (1963). As the Court stated in *Barton* v. *United States, supra,* " 'Mitchell was bound hand and foot by the most awesome array of evidence imaginable, quite apart from the confession of Barton.' We cannot, however, substitute ourselves for the jury, whose duty it was to pass upon Mitchell's guilt or innocence. As was said in Kotteakos v. United States, 1946, 328 U.S. 750, 765, . . .

' . . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' " 263 F. 2d at 898.

In *United States* v. *Haupt,* 136 F. 2d 661, 672 (7th Cir. 1943) the Court declared:

"We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted." See *Greenwell* v. *United States, supra,* for application of *Fahy* test.

Although the Attorney General hypothesizes that the jury might have discredited King's testimony on the thesis that it was in his interest to blame Gilbert (Resp. Br. p. 38), this is whimsical. First, the notion is pure surmise. Secondly, it is most unlikely that the jury would feel that King's statement, which so perfectly squared with the independently recovered facts, would be pure fabrication. Rather, the jury would have the human tendency to assume

that on matters where independent evidence was missing King was likewise telling the truth.

As suggested in our opening brief, this case is clearly contained within the rationale of *Jackson* v. *Denno, supra.* Only here the situation is worse. There the jury was required to make an initial determination as to whether a confession was voluntary before laboring on the question of guilt or innocence. However, once the determination of voluntariness was made the confession would either be considered or rejected. We agere that it is unlikely that a jury, even a conscientious one could comply with that requirement. But here it is perfectly obvious that the jury is required to wear two hats and perform a function which would tax even an able trial judge. The jury was asked to accept the declarations of King as true, that is, what he, Gilbert and Weaver did, and then consider them untrue as far as Gilbert was concerned. (See Pet. Op. Br. pp. 12-13) This indeed called for a "feat beyond the compass of ordinary minds," or "a mental gymnastic which is beyond not only their powers but anybody else's." *Nash* v. *United States,* 54 F. 2d 1066, 1067 (2nd Cir. 1932); see *United States* v. *Bozza, supra,* at p. 215.

The respondent further maintains that a motion for severance should be held a condition precedent to the raising of a due process violation on the ground that a co-defendant's confession was illegally introduced. (Resp. Br. p. 45) First and foremost, the California Supreme Court did not regard this factor of moment, especially in view of the fact that its own case which excluded the evidence, *People* v. *Aranda,* 63 Cal. 2d 518, 407 P2d 265 (1965) was decided subsequent to the Gilbert trial and counsel

could not reasonably anticipate the change in the law. Secondly, it would have made no difference since the trial court considered his instructions to the jury adequate to protect the defendant. Thirdly, the statements by King were inadmissible anyhow and it should not have been anticipated that they would be admitted in evidence. See California Supreme Court Op. 47 Cal Rptr at 915-16. Finally, only the prosecution knew what it would introduce in evidence. Therefore, if the prosecuting attorney intended to introduce the damaging statements of King and he knew they would infect Gilbert's chances of a fair trial this information should have been disclosed in a pretrial setting; otherwise, counsel for Gilbert's protests when the statements were offered is objection enough. (R.T. 1939)

In view of the obvious realization that no amount of instruction could have secured Gilbert a fair trial on either the guilt or penalty phases after King's hearsay utterances had been heard by the jury charged with determining Gilbert's fate this case should be reversed and a new trial had on competent evidence unsinged by the damaging hearsay declarations of the co-defendant King.

II. Petitioner After Being Indicted by a California Grand Jury for Murder, Robbery and Kidnaping Was Appointed a Lawyer by the Court and Entered Pleas of Not Guilty to All Charges. Thereafter, He Was Compelled to Then Participate in a "Showup" at Which the Prosecution Cemented Its Case Against Him. The "Showup" Was Conducted Without Prior Notice to Either Petitioner or His Attorney of Record and His Attorney Was Not Afforded an Opportunity to Be Present Nor Make Objections to the Proceeding. This Activity Was in Clear Contravention of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

One of the issues in this case—Right to Counsel at a lineup—is also presented in two companion cases granted Certiorari this term. They are *United States of America* v. *Wade,* No. 334 and *Stovall* v. *Denno,* No. 254. As pointed out in our opening brief, *Wade* held that the Sixth Amendment guaranteed the accused the right to have counsel present at a lineup after the inauguration of judicial proceedings. *Stovall* adhered to a contrary view. In both cases dissents were registered. Also of importance is the fact that the Ninth Circuit Court of Appeals in *Gilbert* v. *United States of America,* 366 F. 2d 923 (1966) held by a two to one margin that Gilbert (your petitioner in the case at bar in a similar case at the Federal level) had not properly presented his "Lineup" issue in the trial court and thus was foreclosed from raising it on appeal. The majority then proceeded to, in the form of elaborate dictum, discuss the issue, as if it had been properly raised and rejected it. The dissenting judge considered the issue not only prop-

erly before the Court but held that Gilbert's Sixth Amendment rights were violated. Judge Browning, in dissent, would have remanded the cause for a determination of the extent to which the eyewitness in-court testimony was contaminated or bolstered by the illegally conducted lineup at which eleven of the twelve percipient witnesses were in attendance.

Inasmuch as the lineup issue in *Gilbert, Stovall* and *Wade* presents substantially the same questions and this counsel has the Government's brief in not only *Gilbert* but in *Wade*, an attempt will be made to survey the entire question of right to counsel at a lineup and urge this Court to set forth what we feel is appropriate Constitutional doctrine.

The opposition's argument when reduced to its essence is predicated upon the insistence that a lineup, no matter whether it occurs after the initiation of judicial proceedings or before is investigatory rather than accusatory in nature, and that the plenitude of Right to Counsel cases requiring an attorney's presence at every stage of criminal proceedings are limited to traditional pre-trial, trial and post-trial events presided over by a judge. Among the most common of these are preliminary hearings, arraignments, pre-trial motions, and the trial itself; and of course, in the event of poor luck probation and sentence, and appeal. Then assuming that its position is well taken, the Government (Federal and State) seeks to convince the Court that the Sixth Amendment Right to Counsel in non-judicial situations is merely an adjunct to the Fifth Amendment Privilege against self-incrimination and serves no other purpose. Finally, the opposition argues that a "lineup" or "showup" involves no question of self-incrimi-

nation and consequently the defendant may be compelled to perform and has no right to either an attorney's advice or presence. Moreover, there is the additional inquiry which must be made under *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4 1966), namely whether the lineup was conducted under such circumstances as to render it violative of Due Process of Law. All four of these contentions are an integral part of the Government's case. Rejection of any substantiates Petitioner's position.

In the event petitioner succeeds in convincing the Court that Gilbert's rights at the lineup were violated, this conclusion carries in its wake the issue of what effect to give the violation. Should there be an *ipso facto* reversal without a showing of possible prejudice under the standard Right to Counsel cases, *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) or should this Court merely exclude the Constitutionally prohibited evidence and apply the test formulated in *Fahy* v. *Connecticut* which requires that there be a showing that the evidence complained of "might have contributed to the conviction," 375 U.S. 85 at 86 (1963). If this latter course is followed shouldn't the tainted fruit of the lineup illegality be likewise excluded? If so upon remand what test should be applied to determine if the in-court testimony was tainted?

Quite candidly the evaluation of these issues calls for the most far-reaching, probing analysis into controversial and complicated Constitutional questions which have meandered into one case that this counsel has ever witnessed. Petitioner will endeavor to fully and fairly tackle each question which presents itself, structure the hierarchy of considerations involved, evaluate the precedents and their bases and portray the counter-horrendum to the Govern-

ment's critique of our position. We answer the provocative questions seriatim.

Our fundamental position is that the Right to Counsel attaches *at least* by the time that judicial proceedings commence. *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); *White* v. *Maryland,* 373 U.S. 59 (1963). When a defendant appears in Court for arraignment, whether it be after indictment or a complaint by a judicial officer, suspicions have not only focused upon him as a triable suspect on a specified charge for which he has been arrested but the prosecution is then thoroughly bent on cementing those charges and the defendant on refuting them or disposing of them in some alternative manner. Since it is necessary that the court and the police throughout the land know when they must afford counsel to the accused in order to operate swiftly and effectively and protect fundamental rights, it is imperative that the onset of the Right to Counsel be as definite as judicial wisdom will allow. The initiation of judicial proceedings provides the best stage upon which to introduce counsel considering all factors involved. Certainly the right should germinate no later although perhaps this right should accrue at the time of arrest. See Argument III. After all a man should not be arrested unless there is probable cause to believe he has committed a specified crime. This notion is implicit in the *Mallory* rule (*Mallory* v. *United States,* 354 U.S. 449 (1957)); otherwise the police would be permitted extensive post-arrest investigation of the subject prior to bringing him before a magistrate and having him informed of his rights.

The value of having the Right to Counsel attach at a traditional stage of Anglo-American criminal proceedings is that these stages repeat themselves in all criminal law

suits and allow for ease of demarcation. To anchor the Right to an Attorney to a concept where there is such great disagreement and difficulties of interpretation and application as self-incrimination commits this court to an unnecessary *ad hoc* analysis of the circumstances of the situation in order to determine whether the Right to Counsel should have attached. Such factors as the nature of the test or examination, how scientific it is at a given moment in our history, how great a role the defendant plays in the acquisition or release of evidence, how voluntary his participation is, whether his mind is exploited to garner the evidence, factors of promises, threats and coercion have all dented the pages of our legal textbooks and decisions. (See Argument III.) While over-simplification is not a virtue, simplicity where possible is not a vice. Moreover—and this is the most telling point in opposition to the Government's overall contention—since both the courts and police must know with reasonable certainty when a subject has the right to an attorney since the penalty for a mistake is at least an exclusion of the evidence, a formulation by this Court in terms of the stages of criminal proceedings is essential. There are at present and on the horizon many practices which may or may not invoke the Fifth Amendment against self-incrimination and unlike the Right to Counsel which is a relatively definite concept there are nuances within each potential self-incriminatory situation which will prevent its elevation to the degree of exactitude possible in Right to Counsel situation. Since this is the predicament and there is a need for a prospective understanding as to when the Right to Counsel attaches it would be folly to make that right hinge upon conditions which will at the least require retrospective examination.

Predicated upon the assumption that nothing which occurs at a lineup threatens the Fifth Amendment, the Government argues that counsel could have performed no function but intermeddle or serve as an additional witness so why confer upon the defendant the Constitutional right to the presence of an intermeddler or mere additional witness at a proceeding?

Of course, based upon what we have said hitherto, the Right to Counsel, not only his presence at the lineup but his advice before attending, should not depend upon a demonstration that he could have advised his client along certain lines or aided the Administration of Justice. As counsel for *Stovall* so well puts it in his opening brief in answer to the question of "what could counsel have done to thwart the identification?", "it is not an attorney's duty to thwart anything, be it an identification, a confession or conviction. It is an attorney's duty to try and protect his client's rights and insure against over reaching by the prosecution." (Stovall Op. Br. p. 13) Counsel might have convinced the trial judge that if a lineup was to be held the witnesses should have been sequestered and asked to identify the robber individually rather than being placed in an auditorium where they announced their identification in the presence of the other witnesses as in this case. Although the majority in the *Gilbert* federal case attempts to proffer a defense of consensus identification procedures, 366 F. 2d at 943, it is nearly universally accepted that solitary identification, at least in the beginning is a safer procedure for correctly identifying the guilty. Ibid 953-55 (dissent)

Consensus identification has all the disadvantages of leading questions, doubt elimination and the join the band-

wagon appeal rolled into one. When one witness identified Gilbert it was only human that special attention would be called to him as distinct from others in the lineup. It's the same thing as an in-court identification if the prosecutor were to say, "that's the man isn't it?" Beside the leading question aspect, there is the human tendency to become more certain when other persons have identified a suspect because the identifying witness need not shoulder the burden of conscience himself but shares that responsibility with others. Even worse than this objection is the bandwagon appeal. The human propensity to join the majority is awesome in such a setting. This is the argument against broadcasting election results before the closing of the polls. People like to be winners and don't like to waste their effort being losers. Plus there is the psychological realization that approval follows adherence to the thoughts of one's compatriots while the dissenter is generally treated as an outcast. Furthermore, one eyewitness doesn't like to be thought of as less observant than his neighbor which will be his appraisal of other's estimation of him should he not so quickly recognize the "guilty party" or have some lingering doubts.

In California, and I'm sure elsewhere, it is so traditional as to be ritual to exclude witnesses during a trial and have the judge instruct them not to discuss their testimony with one another. California Penal Code Sec. 867, 868. This is done as a matter of rote even at the preliminary hearing held before Superior Court arraignment because of the court's astute recognition that once the lonely task of identification is eliminated and the consensus approach is embraced, opinions once confirmed are practically impossible to dislodge. Ibid.

This was precisely the problem in *Palmer* v. *Peyton, supra,* where the court held that the identification procedures violated due process because the witness who admittedly could only identify the guilty party by voice was first shown a shirt which she identified as worn by the rapist and then told to listen to his voice. Needless to say she had little trouble in reaching the conclusion that she had the right man. Albeit the situation is not as clearcut here, but one can surmise the avalanche of witnesses until the number reached eleven who identified Gilbert after the first few had shouted out their identifications. Mr. Justice Frankfurter once wrote that "(T)here comes a point where this court should not be ignorant as judges of what we know as men." *Watts* v. *Indiana,* 338 U.S. 49, 52; Cf. *Sheppard* v. *Maxwell,* 86 S. Ct. 1567 (1966)

Can there be doubt in this case that the deluge of eyewitnesses was the undeniable product of the first few?

In addition to the failure to sequester witnesses, which is the most dramatic objection to the lineup in this case, the court formally or perhaps the Defense Attorney via an informal suggestion to the police or prosecutor might have assured that participants in the lineup were "not grossly dissimilar from the accused in physical appearance." *Gilbert* v. *United States,* 366 F. 2d 923 at 953 (1966)

It may have been the case that a magistrate or even the prosecutor would have allowed the defense counsel to question alleged eyewitnesses in order to decide whether to proceed further with his case. See *Gilbert* v. *United States, supra,* 953. In reality, it is not obstructionist tactics by counsel that the prosecution fears but the first hand knowledge of the strengths and weaknesses of a lineup which

can be only comparatively weakly explored at trial. Although statistics don't exist and are probably impossible to obtain, one can safely surmise that a fairer more objective identification is assured by counsel's presence. Just as custody interrogations of the accused can be unfair so can police-conducted lineups. Trickery and coercion may be employed in any accusatory predicament. This Court in *Miranda* v. *Arizona*, 384 U.S. 436, 470 (1966) recognizes the role counsel can play in cutting down on coercion or unfair tactics. Indeed in the jurisdictions which provide for attorney's presence at a lineup, there has been no suggestion that defense counsel has impeded the administration through unwarranted interference with the identification of offenders. *Gilbert* v. *United States, supra*, 953-55 (dissent).

The Government's brief in the *Wade* case is replete with references to how absurd it is to allow counsel to be present when a lineup is held but not be present when photographs are shown to witnesses. (Wade Br. p. 18-19) Moreover, it is urged that it is even more ridiculous to hold that counsel is required to be present when fingerprints or hair samples are taken and not be present when they are analyzed. (ibid) However, the defect which permeates this comparison is that it assumes that the right to counsel is congruent with the privilege against self incrimination and that since a lineup, in the mind of the Government, is not basically different from photographs and fingerprints, it follows that we would have defense counsel present when mug shots or fingerprints are taken and that since the analysis and followup is at least as important as the acquisition of this evidence counsel must trail the chemist into the laboratory and the detective as he conducts subsequent

interviews. Petitioner strongly suggests that the parade of horribles painted with the imagination of the Government is the strongest argument for not tieing the Right to Counsel into the Fifth Amendment privilege against self-incrimination.

Furthermore, there is a fundamental difference between purely investigatory activities and post-arraignment proceedings. Certainly a premium must be placed on the early solution of crime and apprehension of criminals. Thus surveying the scene for witnesses or showing of photographs to prospective witnesses or the lifting and development of fingerprints and the like should be permitted without counsel but not because a defense attorney's presence would block the administration of justice or prevent the discovery of fresh clues leading to capture and arrest. Rather, police activity should be allowed because general investigation into an unsolved crime does not require the services of a defense attorney. Neither is he or should he be involved in developing a case for the prosecution which would warrant the arrest, indictment and arraignment of a prospective defendant on a specified charge.

But once the arraignment stage is reached, his advice and his presence can most surely prevent overreaching. See *Gilbert, supra,* 953-54, fn. 9. Furthermore, the Government's attempt to equate post-arraignment and pre-arraignment events which share the likeness of involving the same investigative technique amounts to "a matching of cases on irrelevant facts." See *Silverman* v. *United States*, 365 U.S. 505, 512-513 (1961) The suggestion that photographs may be examined by witnesses before arrest and indictment without counsel so why not after arraignment or fingerprints may be taken before arrest and indict-

ment so why not after, is misleading. As well argue that these events cannot take place *in trial* unless counsel is present, so why should they be allowed to take place before trial without his presence. The crux of the matter is that the question should not be whether the matter tends to incriminate or what type of investigative technique is involved but *at what point this court should attach the Sixth Amendment!* Again we stress that having an attorney or even a judge present during the preparatory phases of the prosecution's case is not a positive evil. It is just not practical enough to constitute a Constitutional command nor is it a proper function for a defense attorney.

Similarly, we may dispose of the Government's contention that a post-arraignment identification procedure, whether using photographs or a lineup is substantially no different than one preceding indictment since the Government is still preparing its case. (See Wade Br. p. 12)

Although the Government stresses that counsel would be merely another witness for the defense and that the defendant can testify to what occurred, this is not quite the case. It has been recognized, as previously stated, that counsel gives the proceeding an assurance of fairness; furthermore, a defendant in a criminal case is not considered an unbiased witness. Examine the number of convictions obtained in cases where there are but two witnesses, a police officer and a defendant, in vice or narcotic transactions, for example. We cannot posit as a general proposition that the prosecutor through the lethal mechanism of cross examination although it may be "the greatest legal engine for the discovery of the truth" relentlessly attacks the defendant and exposes him as an arrant liar in these cases. Normally no such expose is forthcoming in one-on-one

situations involving a police officer and a defendant and the prosecutors' and defense counsels' who can avow to such a contention are legion. Although the jury is traditionally instructed that the word of a police officer is entitled to no greater weight than that of a defendant by virtue of his being a police officer, it certainly is accorded more weight in the traditional case. As long as both the defendant and police officer tell reasonable stories the police officer will be believed if for no other reason than the common sense appraisal that officers who have not had previous contact with subjects don't arrest them without cause. In fact, this Court has even recognized that once a defendant or even prosecution witness has been dirtied with the accusation of criminal activity he no longer stands on a par with other witnesses. See *On Lee* v. *United States*, 343 U.S. 747, 756 (1952) Thus again, we demonstrate that the presence of counsel during any of these procedures is not a positive harm but may be a positive good.

Similarly, when the Government starts from the premise that counsel is more needed when fingerprints are compared and analyzed or blood tested than when fingerprints are taken and blood extracted there is still the hidden premise that counsel may have functions to perform albeit his defendant is absent and not presently in use and the Fifth Amendment may not be involved. This is a premise we wholeheartedly endorse. Were we to shape the right to counsel anew we would strenuously argue that he should attend police procedures, not directed at determining whether a crime had been committed or who did it, but those conducted subsequent to the arrest of a suspect because his presence would assure fair procedures and he would be a witness where now there is none. Again we take

refuge in the fact that it is not necessary that the Court go that far but that if the Court were disposed to do so it would be a positive good for the legal system as a whole. And we hasten to reiterate that the Government has in reality destroyed the myth that counsel need only be concerned about keeping his client's lips sealed until the proper time to speak, if at all. He has services to perform involving evidence received from or dependent on his client and those services may well need to be performed when the client is absent.

If the Government contends that counsel had no right to attend this lineup because the defendant had no Constitutional right to prevent an immediate confrontation of the defendant and victim immediately upon discovery of the crime and apprehension of the defendant or no right to be present when photographs were shown to witnesses when a search for the guilty party was in progress we merely reply that if at trial the prosecution were to spot blood on the defendant's boots that defense counsel would have the right to be present while the material was analyzed and I doubt if there's a judge in the land who would deny him that right. Similarly, although counsel has no right to be present at the scene of the crime when the defendant is arrested, he might well have if any function were to be performed there during the trial. If the scene of the crime is to be viewed during the trial, counsel is one of the first to be invited to attend.

Another flaw in the position of the Government is that there is such an entity as a "lineup" or "showup." Basically what is involved is a situation wherein a potential witness views the defendant or hears him speak. This process can occur under a variety of circumstances. But to refer to

a lineup as an entity is like classifying all writing of a defendant as a handwriting exemplar. It's the kind of handwriting specimen, the content and the context which determine Fifth Amendment Rights. See Argument III. Similarly, the context of the lineup determines the rights conceivably violated. The embroidery is all important. We know some lineups can be held so rank an injustice as to offend due process, putting aside other constitutional considerations. See *Palmer* v. *Peyton, supra.* We know that exemplars may constitute confessions, or admissions or even exculpatory statements which are afforded Fifth Amendment protection. See *Miranda* v. *Arizona, supra.* And note that exculpatory statements are cast as admissions and are protected under *Miranda, supra,* for the reason that in a trial context they may inculpate. Any competent trial lawyer knows that a frightened defendant may convict himself without cause by denying his presence at a commotion and be proved a liar when his presence was properly explainable in terms of non-criminal conduct.

Petitioners flatly state that no case has ever held that a lineup cannot place the defendant in a setting where he is called upon to incriminate himself. In the most quoted case on the subject of whether a defendant can prevent exhibiting himself by the assertion of the Fitfh Amendment there is usually a neglect to cite the part of Justice Holmes dictum wherein he expressly reserved the question of "how far a court would go in compelling a man to exhibit himself" because of the Fifth Amendment. *Holt* v. *United States,* 218 U.S. 245, 253 (1910)

Much as a lie-detector may make one a self-accuser, see *Schmerber, infra,* p. 1832, so may a lineup. An incriminatory item or the name of the deceased, presumably unknown

to a lie-detector subject, if innocent, which causes an appreciable rise in pulse rate and blood pressure while innocuous items and names do not, may furnish useful evidence obtained because of the subject's terror-reaction engendered by his own guilt. Likewise, as here, Gilbert was described as not raising his voice when first asked to do so, *Gilbert* v. *United States,* at 951 (dissent). The lineup thus wrung out of him the same type of incrimination as a lie detector working at its optimum. Although there is very little in the State trial record of the Gilbert case on the actual performance of Gilbert and the other participants in the lineup, the Attorney General candidly brings to the Court's attention the extensive involvement of the participants which appears in the Federal trial record. See Resp. Br. p. 65-6, n. 2. Not only were Gilbert and his cohorts in the experiments required to present their front and profile views to the witnesses congregated in the auditorium but were required to put on and remove certain items of clothing, presumably the same or similar clothing worn by the robber sought to be identified. They were asked to speak in a loud and then a soft voice and to utter phrases such as "Freeze, this is a stickup"; "This is a holdup"; "This is a heist"; "Don't move anyone"; "Empty your cash drawer", etc. See *Gilbert* v. *United States, supra,* p. 951, ibid. These were the phrases reportedly uttered by the gunman-killer. In effect, Gilbert was compelled to reenact the crimes. Gilbert was also required to walk at both a normal and rapid pace. He was also asked about ownership of an automobile and whether he was armed when arrested. Ibid. Since the car Gilbert was known or was thought to have travelled to the bank and departed in was well known, this called for an incriminatory response. Furthermore, the question of whether he was armed when

arrested sought an incriminatory answer. If Gilbert told the truth, (The California Supreme Court held the trial court committed error in introducing proof that Gilbert was armed when arrested in Philadelphia), he made himself suspect for carrying a gun and appeared dangerous as well. If he answered no, he would reasonably expect to be impeached at trial so he might have concluded that he may as well admit carrying the gun. There is no evidence that anyone told him that his statements at the lineup were of a particular breed and would not be used against him at trial. On the contrary, he had been informed prior to that time that his statements would be used against him. See facts of Philadelphia arrest. Thus he was forced either to utter incriminatory admissions or to make a scene and assert his right to silence which would tab him as the guilty party right away.

Counsel may have been able to avoid all of this. Assuming for the purpose of argument that the statements placed in his mouth were not incriminating and were only to be uttered for the purpose of voice identification his counsel could have advised him that he could speak what he was told to speak, as all other persons were instructed to do likewise, but that he could refrain from ad-libbing answers to questions concerning the crime or the circumstances of his arrest. If counsel were advised of the lineup and allowed to be present and told what questions were to be asked and the responses to be elicited, he could have eliminated all of the clearly incriminatory material. If not, a ruling from a judge on a motion could have been secured.

The Government will certainly concede that a defendant has a right to have an attorney present motions for him in court and to have a judge rule on them. Yet here, appro-

priate motions were not made because counsel was not contacted and thus had no opportunity to make them. If the right to counsel is disallowed or held in abeyance, or proceedings are held in secret without counsel being advised, the Government can hardly argue that the motions could be made at trial if the damage had been earlier rendering the motions futile or tardy. See *Hamilton* v. *Alabama, supra.*

The thrust of the above illustrations of what can happen and has happened at a lineup point unerringly to the conclusion that counsel should be advised that it will take place so that he may advise his client, discuss the matter with the prosecutor, police and court and be present to assure fundamental fairness. If this is done, incriminating statements, such as those obtained here, which were used to garner or bolster witnesses can be avoided, tricks and coercion can be deterred, see *Gilbert* v. *California, supra,* 954, fn. 9, and decisions such as *Palmer* v. *Peyton, supra,* won't have to be reversed.

Nothing that has been suggested in defense of extending the Right of Counsel to a post arraignment lineup is predicated upon suggestions which have been greatly criticized by judges and our opponents in these cases such as advising a defendant that he need not participate in the lineup at all or not wear certain clothing or wear a mask to shield his appearance. See *Stovall* v. *Denno,* 355 F. 2d 731, 739 (2nd Cir. 1966); *Gilbert* v. *United States, supra,* 941. Lamentably, most of the diatribe against our position has concerned itself with controverting a straw man assertion that our position—that Right to Counsel at a lineup—hinges upon counsel being able to prevent its occurence at all, having the right to mask the defendant and telling

him to remain totally silent. As the court can see, our position is not bottomed upon any of these considerations.

However, this Court has not previously decided the extent to which a defendant need participate in a lineup, if at all. It has not decided that a defendant must participate in trying on clothing worn by the robber and utter phrases uttered by him at the time of the crime.

Let us first consider the question of clothing to be worn at the lineup. Normally a mug shot shows only the countenance, profile and build of the subject and doesn't serve to place incriminatory clothing upon the defendant. If the picture shown the witness happened to disclose the same sweater, for example, which was later worn in a robbery there could be no objection because the prosecution or police could not be charged with anticipating that the person once mugged would subsequently commit robberies wearing the same apparel which he wore at the time his mug shot was taken. Even if they could, the defendant would have no Constitutional right to wear one garment rather than another.

However, when a defendant is asked to actively take clothing provided him, and put it on so as to resemble the man who committed a crime this requires a voluntary act on his part which most certainly incriminates him. Whether this is protected by the Fifth Amendment this Court must decide. Unlike the handwriting exemplar which is tantamount to an assertion, "This is my handwriting", *Weintraub, supra,* p. 5031, the defendant would not be saying: "This is my jacket" or "This is my hat" in a lineup because all other persons would be doing the same thing and consequently the placing of clothing upon each subject denudes

the personal warranty. However, if the assailant in *Stovall,* for example, were taken to the hospital room wearing clothing which he was required to outfit and it was virtually identical with that worn by the criminal, the clothing would assert to the prospective witness that it belonged to the defendant and he was the guilty party. Similarly, in *Wade,* if the defendant is seen wearing clothes similar to those worn by the robber in the hallway in the custody of the police and prior to a lineup wherein each person puts on the same apparel the defendant would be incriminating himself in the Constitutional sense. Thus once again we see the question of self-incrimination cannot be resolved by setting out categories such as handwriting, fingerprinting, photographing, lineups, lie detectors and ruling as an immutable principle of Constitutional law that certain classes are self-incriminatory and others are not. If this cannot be done then how can this Court tie the important Right to Counsel principle which must be evaluated prospectively, to a right that is far more complicated and often requires an *ad hoc* retrospective evaluation to determine if it existed and was violated.

Decisions in lawsuits are usually dedicated to resolving featured problems. For example, the pivotal issue in *Schmerber* v. *California,* 86 S. Ct. 1826 (1966) was the limitations of the Fifth Amendment. This Court recognized that too broad a construal of the Fifth Amendment would never allow for compliance with the Fourth. If all items which the defendant possessed either bodily, or otherwise kept under his dominion and control, were held to be protected from seizure and use because of the Fifth Amendment then no search warrant, no amount of probable cause, would ever allow for its acquisition and use in evidence.

All searches and seizures would be illegal, excepting perhaps those limited to contraband itself. *Schmerber,* this counsel believes, adopts the approach that many items which would be legitimately subject to seizure if probable cause exists do tend to incriminate and are taken from the person; nevertheless the Fifth Amendment should not be interpreted to encompass them. In other words, the query is *Schmerber* is whether the kind of self-incriminating evidence involved should be given Fifth Amendment protection.

This Court's opinion in the *Schmerber* case (86 S. Ct. 1826-1966) was very guarded on the Sixth Amendment issue. There it was merely held that the results of the blood test did not become inadmissible merely because the defendant's attorney had instructed him not to take it. Since the defendant had no Constitutional right to refuse the test, the fact that his attorney had previously falsely advised him as to his right in that regard did not operate to exclude the evidence. The Court then concluded the Right to Counsel question by declaring: "No issue of counsel's ability to assist petitioner in respect to any rights he did possess is presented. The limited claim thus made must be rejected." At page 1833.

Thus the Court simply declined to hold that the well-established rule that a defendant has the absolute right to an attorney after the commencement of judicial proceedings should be extended to a pre-judicial event wherein the police were merely gathering evidence for the purpose of presenting it to the prosecutor in order to ascertain whether a complaint should be lodged.

It is not our position that the defendant has a Constitutional right to have counsel at the scene of the crime at the

time of the occurrence of his arrest; it is not our position that the evidentiary investigation which precedes the arrest and the inception of judicial proceedings must be presided over by a judge or conducted in the presence of the defendant or his attorney. But it is our position that after the proceedings become judicial in nature the defendant should have an attorney to advise him and should have to do nothing without first being able to consult with an attorney.

As a matter of fact, the notion that an attorney would be a hindrance to the administration of justice since he might try and disrupt efficient police work is probably not correct. And if it is correct, it is only because there is simply not enough manpower to provide judges at the scene of a fingerprint or ballistics examination who could listen to the suggestion of both Government and defense attorneys on the question of procedures designed to secure fair tests; perhaps even neutral experts unconnected with the police force should make examinations. It has long been a complaint of the criminal bar that while police serve as investigators for the prosecution there is no one—except in the case of the affluent—to serve as investigator for the accused. It is even possible that the police could be ordered by the court to carry out investigations for the accused. The fact that they are primarily prosecution-oriented because they are engaged in the principal task of ferreting out crime and apprehending criminals does not incapacitate them from serving the role of investigator for the accused. Much as the Government is supposed to prosecute only the guilty and protect the accused, in theory, such should be the function of the police force. Perhaps in the year 2000 such an approach will become integrated into our way of life. It certainly has much to speak for it. The police and

prosecution would become more neutral and less zealous in the pursuit of prosecutorial inclinations.

But since this is the world of 1967, Petitioner is content with suggesting that there is ample precedent and common sense favoring the selection of an attorney to journey with a defendant from the inception of judicial proceedings to their conclusion. See Argument II of Petitioner's Opening Brief. Therefore, the argument of the State of California that if the lineup was vulnerable under *Massiah*, it was vulnerable under *Escobedo* does not necessarily follow. (Resp. Br. p. 61) Nor has this Court so stated. (*Massiah* and *Escobedo* majorities not identical) Furthermore, the fact that a majority of this Court declined to extend the Right to Counsel to the evidence-gathering phase of the *Schmerber* case, when not even a District or City Attorney had been consulted about a complaint for drunk driving, and the police had not yet learned whether the defendant was intoxicated, and if so to what degree, should not prevent this tribunal from securing the right to counsel after the police had arrested the defendant, the District Attorney obtained an indictment, the defendant was arraigned and the Judiciary of the State of California had properly appointed the defendant an attorney to represent him throughout the proceedings.

The final questions have to do with the effect of the error committed. Traditional right to counsel cases have reversed automatically when this precious right was denied. *Johnson* v. *Zerbst*, 304 U.S. 458; *Hamilton* v. *Alabama*, *supra*. Recent cases have focused on the harm done and made that the basis for decision. For example, *Massiah* v. *United States*, *supra*, and *Escobedo* v. *Illinois*, *supra*, reversed because certain incriminatory statements were ex-

tracted after the right to counsel attached and because of inadequate advice as to the defendant's Constitutional rights. Presumably, the statements alone were rendered inadmissible.

Petitioner suggests that at least what is required in this case is that the illegality be totally purged, that is the lineup and its impact on the trial be isolated and if this material "might have contributed to the conviction," *Fahy* v. *Connecticut, supra,* at 86, the cause should be reversed. We strongly urge that this Court follow the reasoning in the dissent in *Gilbert* v. *United States, supra,* wherein an accommodation principle is suggested. Obviously such violations as occurred here must be deterred and yet the Court may not wish to void all trials in which error is committed. This case should ordinarily be remanded for a determination of the role the lineup identification played in bolstering or assuring the in-court testimony. However, we strongly urge here that the consensus lineup rendered any future fair individual account of what the alleged eyewitnesses saw a virtual impossibility and suggest that the cause be reversed and the case dismissed. Petitioner will still be facing a 100 year Federal sentence so the only practical effect would be the erasure of the death penalty accorded him by the trial jury in the State case.

III. Petitioner After Being Apprehended in Pennsylvania by Federal Agents Asserted His Right to an Attorney and His Right to Silence. Nevertheless, Through Unwarranted Questioning at the Least and Probable Trickery, Gilbert Was Compelled to Furnish the Agent With Handwriting Exemplars Which Were Used to Prove Guilt of the Charges Against Him. Thus, His Sixth, Fifth and Fourteenth Amendment Rights Were Violated.

We feel that it has been amply demonstrated in our opening brief that Petitioner-Gilbert never waived his right to an attorney nor his privilege against self-incrimination (Pet. Op. Br. pp. 25-28), thus we pass immediately to the response of the Attorney General of the State of California dedicated to showing that the handwriting exemplars extracted from Gilbert did not constitute Fifth, Sixth and Fourteenth Amendment infringements.

A. *Petitioner's Sixth Amendment rights were violated.*

Respondent asserts that the Right to Counsel attaches only in situations wherein the accused is called upon to incriminate himself. (Resp. Br. p. 72) This fundamental right is not nearly so limited. *Miranda* v. *Arizona*, 384 U.S. 436, 465 n. 35 (1966); *Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961); see *Gilbert* v. *United States*, 366 F. 2d 923, 955 (9th Cir. 1966) (Browning, J., dissenting), and *Stovall* v. *Denno*, 355 F. 2d at 743 (Friendly, J., dissenting). Although a defendant has a Constitutional right not to incriminate himself, this is but one of the fundamental guarantees which attach at the time of his custodial predicament. Escobedo was informed of his right to remain silent

and that anything he said could be used against him but this Court nevertheless reversed because the defendant's Right to Counsel had been denied. *Escobedo* v. *Illinois*, 378 U.S. at 499 (White, J., dissenting). It is now settled that this right attaches without request. *Miranda* v. *Arizona, supra.* Similarly, as in *Escobedo*, here, after his arrest and before trial was the time when Gilbert needed counsel most. *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932). Otherwise, the remainder of the proceedings become merely an appeal from a police trial rather than the fair judicial trial to which the accused is entitled. Inasmuch as the Sixth Amendment Right to Counsel had attached prior to the securing of handwriting exemplars from the defendant they should have been excluded and the cause reversed. See *Hamilton* v. *Alabama, supra; Massiah* v. *United States*, 377 U.S. 204 (1964); *Escobedo* v. *Illinois, supra.*

B. *The handwriting exemplars taken from petitioner were in violation of his Fifth and Fourteenth Amendment Rights.*

The respondent contends that the petitioner had no right to refuse furnishing to the F.B.I. samples of his handwriting because handwriting is not within the scope of Fifth Amendment protection. (Resp. Br. pp. 72-79) We vigorously disagree! It is argued that handwriting exemplars are not "testimonial or communicative" in nature, see *Schmerber* v. *California*, 86 S.Ct. 1826 (1966). However, unlike the blood donor in *Schmerber*, the person providing an exemplar must do a voluntary mental act which creates the evidence against him. While Schmerber was merely required not to resist the routine taking of blood, Gilbert was required to affirmatively bring into existence the hand-

writing exemplars. In fact, fingerprints, photographs and blood could all be acquired from a passive defendant but handwriting requires the active participation of the subject. Moreover, the authorities have shown that the exemplar is tantamount to a declaration that "This is my handwriting" which is most definitely "testimonial" or "communicative" in character. Weintraub, 10 U and L. Rev. 485, 503 (1957); see Maguire, Evidence of Guilt 31 (1959); *Gilbert* v. *United States,* 366 F. 2d 923, 952 (1966) (Browning, J., dissenting).

Respondent suggests that Gilbert was only asked to provide an example of his writing and not to copy a sketch of the bank area drawing found earlier in his apartment. (Resp. Br. p. 78) Clearly there can be no Constitutional difference between the two performances! In each the defendant is forced to furnish an example of his handwriting and in each there then follows either expert or lay opinion that the exemplar (whether a signature or a map drawing) is made by the same person as the one who sketched the map found in the apartment. The mere fact that the one may call for a more sophisticated analysis than the other is not a fulcrum for determining the existence of a constitutional right. A defendant cannot be compelled to give even clues to his downfall much less render it a near certainty. See *Ashcraft* v. *Tennessee,* 322 U.S. 143 (1944). Here the unauthorized matchup of Gilbert's handwriting sample with the bank-map found in his apartment spelled his doom as clearly as if he'd said "the handwriting is mine" without being first informed that he could say nothing.

Next the State of California asks this Court to hold that as a matter of Constitutional law handwriting is real

or physical evidence like eyewitness identification, photographs or fingerprints. This, in spite of the fact that there is substantial evidence supportive of a conclusion that questions of analysis and interpretations are far more difficult in the handwriting realm. See Weintraub, *supra,* p. 497 fn. 43.

Implicit in this suggestion are a number of troublesome problems: First, there is the underlying premise that the more definite a science becomes—the more precise, accurate and pinpointing its measurements—the less Fifth Amendment protection is involved; or to be more exact, when a so-called police science which requires interpretations of factual phenomena reaches the stage where a consensus regards it as scientific and unlikely to produce error, the raw material of that science which hitherto had received Fifth Amendment protection is then elevated to the "real evidence" shelf and the problem of self-incrimination is put aside. Here the Attorney General would have the court draw from the group of authorities holding handwriting on a par with photographs and fingerprints and place the Constitutional imprimatur of "real evidence" upon handwriting samples. Contrary authority is to be ignored. That procedure commits this Court to the *ad hoc* process of evaluating police tools designed to extract evidence from the accused in order to rule Fifth Amendment coverage either in or out. Furthermore, until this Court decides a given problem, the question of whether the defendant has the right to refuse surrendering or, as here, manufacturing evidence and has the right to have counsel present hang in the balance and are subject to the vagaries of the police and lower courts.

This foreseeable problem provides convincing ammunition for not anchoring Sixth Amendment Right to Counsel

protection to Fifth Amendment evidence problems. Right to Counsel as explained earlier should be tied to perennial and inescapable stages of all criminal proceedings, either at arrest or at the initiation of judicial proceedings. If the Right to Counsel, at least in a pre-trial setting, hinges solely on whether material encompassed by the Fifth Amendment is subject to seizure, counsel plays the highly unsatisfactory role of the bobbing cork appearing and vanishing at unpredictable intervals with neither he nor the judiciary nor the police knowing whether he should be on the scene or off nor the consequences of his absence if his presence be demanded.

Although in *Schmerber,* the Court opined that the lie detector would "evoke the spirit and history of the Fifth Amendment" (86 S.Ct. at 1832) there is every reason to believe that if its questionable scientific stature were to improve it might make the grade and become regarded as "real evidence." If the lie detector did attain that status, the prosecution would maintain that the Fifth Amendment wasn't involved because the instrument could be a boon to the defendant if he was telling the truth because it would halt prosecution. This is the same argument used to justify lineups and other prosecutorial procedures. See *Stovall* v. *Denno,* 355 F. 2d 731, 735 (1966). Of course, the answer to that claim is simple enough. The argument does not truly lead to a removal of Fifth Amendment protection but rather merely affords the defendant an opportunity to waive that protection and convince the prosecution, if it is willing, that an innocent man should not be placed on trial.

Naturally, it will be urged that the lie detector is different from a fingerprint, photograph or handwriting exem-

plar in that it seeks to invade the mental processes to obtain evidence of guilt by measuring physiological changes in the accused rather than just registering physical facts themselves. However, in principle, the lie detector may be as non-accusatorial in form as the taking of a sample of handwriting, with each carrying a potentiality towards more elaborate self-incrimination. Questions about the crime which only the guilty party would know may be directed at the accused and a rise in pulse or blood pressure recorded. Similarly, the accused may be asked to copy a ransom note used in a robbery and the exemplar can then be compared and contrasted with the note used in the holdup. Mistakes in spelling and other tell-tale errors or identities could then convict the accused.

Does the phrase "handwriting exemplar" include the whole spectrum of evidence that can be obtained by handwriting? Clearly not, for certainly written confessions must be both voluntary and preceded by appropriate Constitutional admonitions. See *Escobedo* v. *Illinois, supra.* Does the Attorney General then argue for a rule which, in effect, admits evidence of less value and requiring slightly more interpretation and excludes evidence which is more convincing and necessitates less interpretation. And do we again make the right to counsel depend upon the correct answer to all of these inquiries? Could the personal papers of *Boyd* (*Boyd* v. *United States,* 116 U.S. 616 (1886)) be seized if there was a handwriting issue in that case? If so could their purpose be limited to handwriting and if so would the courts be duty bound to carefully guard against a poisoned fruit search for evidence arising out of information contained in documents constitutionally protected against inspection or use but not

against handwriting analysis? If handwriting may be used to show identity, then may not the police seize every piece of writing found in every contraband case where dominion and control over a domicile or vehicle is involved so as to compare the document with a subsequently obtained exemplar to show possession of the premises?

As a matter of fact, if a defendant may be compelled to provide an example of his handwriting for the purpose of determining whether he wrote a demand note or a map of a bank he is alleged to have robbed, why can't the same purpose allow for the compulsory copying of either? And if that compulsory act is lawful to allow for a comparison of handwriting, may not the officer use any incriminating evidence which he accidentally learns pursuant to the purpose of comparing handwriting which is in "plain view" cf. *People* v. *Roberts,* 47 Cal. 2d 374, 303 P. 2d 721 (1956) and cannot be ignored such as spelling mistakes or a tendency to start at a certain place on the page and end at another? Does the Right to Counsel then depend upon whether self-incriminatory material was in fact obtained —a retrospective assessment—or whether it was a foreseeable event?

In summary, petitioner chiefly urges again the brace of reasons offered in our opening brief for regarding Gilbert's handwriting specimens as self-incriminatory. However, we are most mindful that this is a policy court and that such considerations as ease of administration, and ease of following of precedent, disadvantages of inviting a plethora of *ad hoc* determinations unless necessary are significant factors in attacking a problem. Furthermore, inasmuch as very few cases can receive the attention of this Court it is often necessary to comment upon the im-

portant issues raised by a case such as this one—problems which will inevitably arise and in great quantity as an outgrowth of the pronouncement of this decision. This reply brief has been primarily aimed at probing some of these questions.

Finally, it is our position that under either a Right to Counsel analysis where no inquiry into prejudice occurs, see *Hamilton* v. *Alabama, supra,* or under the *Fahy* test (*Fahy* v. *Connecticut,* 375 U.S. 85 (1963)) where the error need only have been one which "might have contributed to the conviction," this cause must be reversed. Certainly no little weight can be given to the fact that proof was offered that Gilbert was seen to write an exemplar which proved that he also drew the map of the bank which was robbed and where the policeman was murdered.

IV. The Case Against Petitioner Was Derived Largely From Evidence Illegally Obtained From a Private Dwelling Without a Search Warrant, an Incident Arrest or Consent in Violation of Amendments Four, Five and Fourteen of the United States Constitution.

A review of both opening briefs convinces us that the basic issues involved in the larger Search and Seizure question are before this Court with proper briefing. It is only necessary to refer to several citations mentioned for the first time in Respondent's brief. The Attorney General cites the case of *Caldwell* v. *United States,* 328 F. 2d 385 (8th Cir. 1964) cert. den. 380 U.S. 984 (1965) for the proposition that the F.B.I. agents had the right to open the envelope found in Gilbert's apartment containing the photographs for identification purposes. Caldwell only

stands for the proposition that property abandoned—in that case a car and its contents—no longer has search and seizure protection. The *Caldwell* court relies upon authorities where evidence was held legally obtained because it had been wilfully produced or left abandoned. In this case there was no authority given to break in Gilbert's apartment and roam around picking up everything in sight.

Respondent also quarrels with the lengths to which petitioner puts the "tainted fruit" doctrine. We cited the standard cases holding that *all* fruits of the illegal search and seizure or illegal detention should be forbidden usage by the Government. Additional cases so indicating are *Nueslein* v. *District of Columbia,* 115 F. 2d 690 (1940); *Rogers* v. *United States,* 330 F. 2d 535 (5th Cir. 1964); *United States* v. *Marrese,* 336 F. 2d 501 (2nd Cir. 1964); *Bynum* v. *United States,* 262 F. 2d 465 (1958). Respondent cites the case of *Smith* v. *United States,* 324 F. 2d 879 (D.C. Cir. 1963) cert. den. 377 U.S. 954 (1964) wherein the Court of Appeals, with Judge Bazelon dissenting, refused to exclude the testimony of a witness against the defendant when it was shown that the defendant was not promptly arraigned under the *Mallory* decision and during this period of time furnished to the police the name of an eyewitness to the crime. They later located him and he testified against the defendants at trial. The Court held the taint too attenuated to require exclusion of the testimony. Judge Bazelon in his dissent emphasized that the policy of deterrence requires that the taint be traced as far as it can and rooted out wherever possible. Otherwise, violations of the law will still be encouraged. If officers know full well that they may not seek to admit evidence illegally seized but

can nevertheless use it to bolster witnesses, obtain other evidence and follow up leads, or even use the evidence in a subsequent civil proceeding, see *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania,* 85 S.Ct. 1246 (1965); *Boyd* v. *United States,* 116 U.S. 616 (1866), the search and seizure prohibitions will serve as little of a deterrent since it has been generally acknowledged that civil suits for false arrest and the like are frivolous and rarely successful. See *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

In this very case photographs of Gilbert were used to obtain the testimony of eyewitnesses to the bank robberies and a drawing of the bank area in Gilbert's handwriting was taken from his apartment and used to compare with an exemplar later obtained from Gilbert after his arrest in Philadelphia. Thus the fruits of the illegal seizure proved most helpful to the prosecution. To discourage their use, all taint flowing from their usage, extrajudicial, as well as in-court, should be located and denied admission in evidence. The case should be remanded and that evidence substantially dependent upon the illegally seized materials should be excluded from the next trial. Evidence free of taint should be held admissible. This allows for the best possible overall accommodation between the interests of the people and the accused. See *Gilbert* v. *United States,* 366 F. 2d 923, 956-58 (1966) (Browning, J., dissenting).

Respectfully submitted,

LUKE MCKISSACK
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1966.

Jesse James Gilbert, Petitioner, *v.* State of California.	On Writ of Certiorari to the Supreme Court of California.

[June 12, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

This case was argued with *United States* v. *Wade*, *ante*, and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges constitutional errors in the admission in evidence of testimony of some of the witnesses that they also identified him at the lineup, in the admission of handwriting exemplars taken from him after his arrest, and in the admission of a co-defendant's out-of-court statement mentioning petitioner's part in the crimes, which statement, on the co-defendant's appeal decided with petitioner's, was held to have been improperly admitted against the co-defendant. Finally, he alleges that his Fourth Amendment rights were violated by a police seizure of photographs of him from his locked apartment after entry without a search warrant, and the admission of testimony of witnesses that they identified him from those photographs within hours after the crime.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California

Supreme Court affirmed, 63 Cal. 2d 690, 408 P. 2d 365. We granted certiorari, 384 U. S. 985, and set the case for argument with *Wade* and with *Stovall* v. *Denno*, *post*. If our holding today in *Wade* is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

I.

The Handwriting Exemplars.

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alhambra robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner had waived any rights that he might have had not to furnish them. "[The agent] did not tell Gilbert that the exemplars would not be used in any other investigation. Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief." 63 Cal. 2d, at 708, 408 P. 2d, at 376. The court did not, therefore, decide petitioner's constitutional claims.

We pass the question of waiver since we conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

First. The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . . ." *Schmerber* v. *California*, 384 U. S. 757, 763–764. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection. *United States* v. *Wade, ante,* at —. No claim is made that the content of the exemplars was testimonial or communicative matter. Cf. *Boyd* v. *United States*, 116 U. S. 616.

Second. The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate his right to a fair trial. Cf. *United States* v. *Wade, ante.* If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the

[State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts." *United States* v. *Wade, ante,* at —.

II.

Admission of Co-Defendant's Statement.

Petitioner contends that he was denied due process of law by the admission during the guilt stage of the trial of his accomplice's pretrial statement to the police which referred to petitioner 159 times in the course of reciting petitioner's role in the robbery and murder. The statement was inadmissible hearsay as to petitioner, and was held on King's aspect of this appeal to be improperly obtained from him and therefore to be inadmissible against him under California law. 63 Cal. 2d, at 699–701; 408 P. 2d, at 370–371.

Petitioner would have us reconsider *Della Paoli* v. *United States,* 352 U. S. 232 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from the references to him in a co-defendant's statement), at least as applied to a case, as here, where the co-defendant gained a reversal because of the improper admission of the statement. We have no occasion to pass upon this contention. The California Supreme Court has rejected the *Della Paoli* rationale, and relying at least in part on the reasoning of the *Della Paoli* dissent, regards cautionary instructions as inadequate to cure prejudice. *People* v. *Aranda,* 63 Cal. 2d 518, 407 P. 2d 265. The California court applied *Aranda* in this case but held that any error as to Gilbert in the admission of King's statement was harmless. The harmless error standard applied was that "there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction," a standard derived by the court from our decision in *Fahy* v.

Connecticut, 375 U. S. 85.[1] *Fahy* was the basis of our holding in *Chapman* v. *California*, 386 U. S. 18, and the standard applied by the California court satisfies the standard as defined in *Chapman*.

It may be that the California Supreme Court will review the application of its harmless error standard to King's statement if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications. However, this at best implies an ultimate application of *Aranda* and only confirms that petitioner's argument for reconsideration of *Della Paoli* need not be considered at this time.

III.

The Search and Seizure Claim.

The California Supreme Court rejected Gilbert's challenge to the admission of certain photographs taken from his apartment pursuant to a warrantless search. The court justified the entry into the apartment under the circumstances on the basis of so-called "hot pursuit" and "exigent circumstances" exceptions to the warrant requirement. We granted certiorari to consider the important question of the extent to which such exceptions may permit warrantless searches without violation of the Fourth Amendment. A closer examination of the record than was possible when certiorari was granted reveals that the facts do not appear with sufficient clarity to enable us to decide that question. See Appendix to this opinion; compare *Warden* v. *Hayden*, — U. S. —. We therefore vacate certiorari on this issue as improvidently granted. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184.

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[1] The California Supreme Court also held that ". . . the erroneous admission of King's statements at the trial on the issue of guilt was not prejudicial on the question of Gilbert's penalty," again citing *Fahy*, 63 Cal. 2d, at 702, 408 P. 2d, at 372.

IV.

The In-court and Lineup Identifications.

Since none of the petitioner's other contentions warrant relief, the issue becomes what relief is required by application to this case of the principles today announced in *United States* v. *Wade, ante.*

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, both identified Gilbert in the courtroom and testified, in substance, to her prior lineup identification on examination by the State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The lineup was on a stage behind bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.[2]

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[2] The record in *Gilbert* v. *United States*, 366 F. 2d 923, involving the federal prosecutions of Gilbert, apparently contains many more details of what occurred at the lineup. The opinion of the Court of Appeals for the Ninth Circuit states, 366 F. 2d, at 935:

"The lineup occurred on March 26, 1964, after Gilbert had been indicted and had obtained counsel. It was held in an auditorium used for that purpose by the Los Angeles police. Some ten to thirteen prisoners were placed on a lighted stage. The witnesses were assembled in a darkened portion of the room, facing the stage

At the guilt stage, after the first witness, a cashier of the savings and loan, identified Gilbert in the courtroom, defense counsel moved out of the presence of the jury to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment made applicable to the States by the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, "predicated at least in large part upon their identification or purported identification

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and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as 'moderator' of the proceedings.

"Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on or take off certain articles of clothing. When a man's number was called and he was directed to step into the circle, he was asked certain questions: where he was picked up, whether he owned a car, whether, when arrested, he was armed, where he lived. Each was also asked to repeat certain phrases, both in a loud and in a soft voice, phrases that witnesses to the crimes had heard the robbers use: 'Freeze, this is a stickup; this is a holdup; empty your cash drawer; this is a heist; don't anybody move.'

"Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify."

of Mr. Gilbert at the showup . . . ." The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup identification on cross-examination and again moved to strike her identification testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. *United States* v. *Wade, ante.* We there held that a post indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup. However, as in *Wade,* the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the in-court identifications had an

independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup.[3] That testimony is the direct result of the illegal lineup "come at by exploitation of [the primary]

[3] There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR 2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 ALR 2d Later Case Service 1225–1228. That is the California rule. In *People* v. *Gould*, 54 Cal. 2d 621, 626, 354 P. 2d 865, 867, the Court said:

"Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial (People v. Slobodion, 31 Cal. 2d 555, 560 [191 P. 2d 1]), but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . evidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind . . . . The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at trial for cross-examination."

New York deals with the subject in a statute. See N. Y. Code Crim. Proc. § 373–b.

illegality." *Wong Sun* v. *United States*, 371 U. S. 471, 488. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. Cf. *Mapp* v. *Ohio*, 367 U. S. 643. That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial. Therefore, unless the California Supreme Court is "able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U. S. 18, 24, Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stage must be set aside.

The judgment of the California Supreme Court and the conviction are vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE joins this opinion except for Part III, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE DOUGLAS.

APPENDIX.

Photographs of Gilbert introduced at the guilt stage of the trial had been viewed by eyewitnesses within hours after the robbery and murder. Officers had entered his apartment without a warrant and found them in an envelope on the top of a bedroom dresser. The envelope was of the kind customarily used in delivering developed prints, with the words "Marlboro Photo Studio" imprinted on it. The officers entered the apartment because of information given by an accomplice which led them to believe that one of the suspects might be inside the apartment. Assuming that the warrantless entry into the apartment was justified by the need immediately to search for the suspect, the issue remains whether the subsequent search was reasonably supported by those same exigent circumstances. If the envelope were come upon in the course of a search for the suspect, the answer might be different from that where it is come upon, even though in plain view, in the course of a general, indiscriminate search of closets, dressers, etc., after it is known that the occupant is absent. Still different considerations may be presented where officers, pursuing the suspect, find that he is absent from the apartment but conduct a limited search for suspicious objects in plain view which might aid in the pursuit. The problem with the record in the present case is that it could reasonably support any of these factual conclusions upon which our constitutional analysis should rest, and the trial court made no findings on the scope of search. The California Supreme Court, which had no more substantial basis upon which to resolve the conflict than this Court, stated that the photos were come upon "while the officers were looking through the apartment for their suspect. . . ." As will appear, a contrary conclusion is equally as reasonable.

(1) Agent Schlatter testified that immediately upon entering the apartment which he put at "approximately 1:05," the officers made a quick search for the occupant, which took at most a minute, and that the continued presence of the officers became "a matter of stake-out under the assumption that the person or persons involved would come back." He testified that the officer who found the photographs, Agent Crowley, had entered the apartment with him. Agent Schlatter's testimony might support the California Supreme Court's view of the scope of search; (2) Agent Crowley testified that he arrived within five minutes *after* Agent Schlatter, "around 1:30, give or take a few minutes either way," that the apartment had already been searched for the suspects, and that he was instructed "to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search." Crowley's further testimony was that the search, pursuant to which the photos were found, was limited in this manner, and that he merely inspected objects in plain sight which would aid in identification. He stated that a detailed search for guns and money was not conducted until after a warrant had issued over three hours later. (3) Agent Townsend said he arrived at the apartment "sometime between perhaps 1:30 and 2:00," and that "well within an hour" he, Agent Crowley, another agent and a local officer conducted a detailed search of the bedroom. He stated that they "looked through the bedroom closet and dresser and I think . . . the headstand." A substantial sum of money was found in the dresser. Townsend could not "specifically say" whether Crowley was in the bedroom at the time the money was found. This testimony might support a finding that the officers were engaged in a general search of the bedroom at the time the photos were found.

The testimony of the agents concerning their time of arrival in the apartment is not inconsistent with any of the three possible conclusions as to the scope of search. Taking Townsend's testimony together with Crowley's, it can be concluded that the two arrived at about the same time. Agent Schlatter's testimony that Crowley arrived with him at 1:10, however, supports a conclusion that Crowley had begun his activities before Townsend arrived. Then there is the testimony of Agent Kiel, who did not enter the apartment, that he obtained the photos while talking with the landlady "approximately 1:25 to 1:30," about the same time that both Crowley and Townsend testified they arrived. In sum, the testimony concerning the timing of the events surrounding the search is both approximate and itself contradictory.

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SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1966.

Jesse James Gilbert, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of California.

[June 12, 1967.]

Mr. Justice Douglas, concurring.

While I agree with the Court's opinion except for Part I,* I would reverse and remand for a new trial on the search and seizure point. The search of the petitioner's home is sought to be justified by the doctrine of "hot pursuit," even though the officers conducting the search knew that petitioner, the suspected criminal, was not at home.

At about 10:30 a. m. on January 3, a California bank was robbed by two armed men; a police officer was killed by one of the robbers. Another officer shot one of the robbers, Weaver, who was captured a few blocks from the scene of the crime. Weaver told the police that he had participated in the robbery and that a person known to him as "Skinny" Gilbert was his accomplice. He told the officers that Gilbert lived in Apartment 28 of "a Hawaiian sounding named apartment house" on Los Feliz Boulevard. This information was given to the Federal Bureau of Investigation and was broadcast to a field agent, Kiel, who was instructed to find the apartment. Kiel located the "Lanai," an apartment on Los Feliz Boulevard, at about 1 p. m., informed the radio control, and engaged the apartment manager in conversation. While they were talking, a man gave a key to the manager and told her that he was going to San Francisco for a few days. Agent Kiel learned from the manager that Flood, one of the two men who had rented Apartment 28

*On that phase of the case I agree with Mr. Justice Black and Mr. Justice Fortas.

the previous day, was the man who had just turned in the key and left by the rear exit. The agent ran out into the alleyway but saw no one.

In the meantime, the federal officers learned from Weaver that Gilbert was registered under the name of Flood. They also learned that three men may have been involved in the robbery—the two who entered the bank and a third driving the getaway car. About 1:10 p. m., additional federal agents arrived at the apartment, in response to agent Kiel's radio summons. Kiel told them that the resident of Apartment 28 was a Robert Flood who had just left. The agents obtained a key from the manager, entered the apartment and searched for a person or a hiding place for a person. They found no one. But they did find an envelope containing pictures of petitioner; the pictures were seized and shown to bank employees for identification. The agents also found a notebook containing a diagram of the area surrounding the bank, a clip from an automatic pistol, and a bag containing rolls of coins bearing the marking of the robbed bank. On the basis of this information, a search warrant was issued, and the automatic clip, notebook, and coin rolls were seized. Petitioner was arrested in Pennsylvania on February 26. The evidence seized during the search of his apartment was introduced in evidence at his trial for murder.

The California Supreme Court justified the search on the ground that the police were in hot pursuit of the suspected bank robbers. The entry of the apartment was lawful. The subsequent search and seizure were lawful since the officers were trying to further identify suspects and to facilitate continued pursuit. 63 Cal. 2d 690, 47 Cal. Rptr. 909.

I have set forth the testimony relating to the search more fully in the Appendix to this opinion. For the reasons stated there, I cannot agree that "the facts do

not appear with sufficient clarity to enable us to decide" the serious question presented.

Since the search and seizure took place without a warrant, it can stand only if it comes within one of the narrowly defined exceptions to the rule that a search and seizure must rest upon a validly executed search warrant. See, *e. g., United States* v. *Jeffers,* 342 U. S. 48, 51; *Jones* v. *United States,* 357 U. S. 493; *Rios* v. *United States,* 364 U. S. 253, 261; *Stoner* v. *California,* 376 U. S. 483, 486. One of these exceptions is that officers having probable cause to arrest may enter a dwelling to make the arrest and conduct a contemporaneous search of the place of arrest "in order to find and seize things connected with the crime as its fruits or as the means by which it is committed, as well as weapons and other things to effect an escape from custody." *Agnello* v. *United States,* 269 U. S. 20, 30. This, of course, assumes that an arrest has been made, and that the search "is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Stoner* v. *California, supra,* at 486. In this case, the exemption is not applicable since the arrest was made many days after the search and at a location far removed from the search.

Here, the officers entered the apartment, searched for petitioner and did not find him. Nevertheless, they continued searching the apartment and seized the pictures; the inescapable conclusion is that they were searching for evidence linking petitioner to the bank robbery, not for the suspected robbers. The court below said that, having legally entered the apartment, the officers "could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit." 63 Cal. 2d, at 707; 47 Cal. Rptr., at 919.

Prior to this case, police could enter and search a house without a warrant only incidental to a valid arrest. If

this judgment stands, the police can search a house for evidence, even though the suspect is not arrested. The purpose of the search is, in the words of the California Supreme Court, "limited to and incident to the purpose of the officers' entry"—that is, to apprehend the suspected criminal. Under that doctrine, the police are given license to search for any evidence linking the homeowner with the crime. Certainly such evidence is well calculated "to identify the suspects," and will "expedite the pursuit" since the police can then concentrate on the person whose home has been ransacked.

Affirmance on the search and seizure point violates another limitation, which concededly the ill-starred decision in *Harris* v. *United States*, 331 U. S. 145, flouted, *viz.*, that a general search for evidence, even when the police are in "hot pursuit" or have a warrant of arrest, does not make constitutional a general search of a room or of a house (*United States* v. *Lefkowitz*, 285 U. S. 452, 463–464). If it did, then the police, acting without a search warrant, could search more extensively than when they have a warrant. For the warrant must, as prescribed by the Fourth Amendment, "particularly" describe the "things to be seized." As stated by the Court in *United States* v. *Lefkowitz*, *supra*, p. 464:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen

> to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Indeed, if at the very start, there had been a search warrant authorizing the seizure of the automatic clip, notebook, and coin rolls, the envelope containing pictures of petitioner could not have been seized. "The requirement that warrants shall particularly describe the things to be seized . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U. S. 192, 196.

The modern police technique of ransacking houses, even to the point of seizing their entire contents as was done in *Kremen* v. *United States*, 353 U. S. 346, is a shocking departure from the philosophy of the Fourth Amendment. For the kind of search conducted here was indeed a general search. And if the Fourth Amendment was aimed at any particular target it was aimed at that. When we take that step, we resurrect one of the deepest-rooted complaints that gave rise to our Revolution. As the Court stated in *Boyd* v. *United States*, 116 U. S. 616, 625:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'; since they placed

'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'"

I would not allow the general search to reappear on the American scene.

APPENDIX.

As the Court notes, there is some confusion in the record respecting the timing of events surrounding the search and the breadth of purpose with which the search was conducted. The confusion results from the testimony of the agents involved.

Agent Kiel testified that Agents Schlatter and Onsgard arrived at the apartment at about 1:10 and entered the apartment a minute or two after their arrival. Kiel received the photographs from Agent Schlatter between 1:25 and 1:30.

Agent Schlatter testified that he, Agent Onsgard and some local police arrived at the appartment about 1:05 and that Agent Crowley and one or two local police officers arrived in another car at the same time. Schlatter briefly talked to Kiel and the apartment manager and then entered the apartment. Upon entering he saw no one. He "made a very fast search of the apartment for a person or a hiding place of a person and . . . found none." This search took "a matter of seconds or a minute at the outside" and "[a]fter we had searched for a person or persons, and no one was there, it then became a matter of a stake-out under the assumption that the person or persons involved would come back." It "seem[ed] to [Schlatter that] an agent had [the photograph] in his hand," when he first saw it, that it "was in the hands of an agent or officers," and Schlatter had "a vague recollection that [the agent or officer told him he had found it] in the bedroom. . . ." There were a number of photographs. Schlatter took the photographs out to Kiel and instructed him to take one of them to the savings and loan and see if anyone there could recognize the photograph. Schlatter testified that he was in the apartment for about 30 minutes after making the search and left other agents behind when he left.

Agent Crowley testified that he entered the apartment "around 1:30, give or take a few minutes either way" and that he would say that the other officers had been in the apartment less than five minutes before he entered. He believed that "the officers and the other agent who had been with [him] at the rear of the building when the first entry was made, entered with [him]." When Crowley entered the apartment it "had already been searched for people." He received "instructions . . . to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search." In the bedroom, on the dresser, Crowley saw an envelope bearing the name "Marlboro Photo Studio"; it appeared to him to be an envelope containing photos and he could see that there was something inside. Crowley opened the envelope and saw several copies of photographs. He discussed the matter with "Onsgard who was in charge in the building and he instructed [Crowley] to give it to another agent for him to utilize in pursuing the investigation, and [he] was reasonably certain that that agent was Schlatter." This was about 1:30 according to Crowley. In the course of his search which turned up the photographs, Crowley "turned over [items] to see what was on the reverse, such as business cards, sales slips from local stores, that sort of item which might have been folded and would appear to possibly contain information of value to pursuit." He relayed the information obtained in this manner to the man coordinating the operation. Crowley remained in the apartment until the next morning.

Agent Townsend testified that he arrived at the apartment "sometime between perhaps 1:30 and 2:00." Within an hour of his arrival, he began a search. Townsend testified that he, Agent Crowley, another agent and a local officer "looked through the bedroom closet and

dresser and I think . . . the headstand." This was after it was known that no one, other than agents and police officers, was in the apartment. Townsend stated that the agents and officers were "[i]n and out of the bedroom," that he found money in the bedroom dresser about an hour after he arrived in the apartment, and that he could not "specifically say" whether Crowley was there at that time.

Thus, there is some conflict regarding the times at which the events took place and with respect to the nature of the searches conducted by the various officers. The way I read the record, however, it is not in such a state "that the facts do not appear with sufficient clarity to enable us to decide" the question presented. Crowley's testimony that he came upon the photographs while searching "for anything . . . that we could use to identify or continue the pursuit" stands uncontradicted, as does his testimony that the apartment had already been searched for a person prior to his search uncovering the photographs. Schlatter's testimony that the operation "became a matter of a stake-out" after the unsuccessful search for a person does not contradict Crowley's testimony. A search for identifying evidence is certainly compatible with a "stake-out." And Crowley best knew what he was doing when he discovered the photographs. Nor does Townsend's testimony that he and others, perhaps including Crowley, conducted a detailed search conflict with Crowley's testimony. First, the record indicates that the detailed search was conducted after the photographs had been found. According to the testimony of Kiel and Schlatter, Schlatter gave the photographs to Kiel at about 1:30; according to Townsend, he arrived sometime between 1:30 and 2. Second, even if the detailed search took place before Crowley found the photographs and Crowley participated in that search, that does not indicate that Crowley's search which turned

up the photographs was more limited than Crowley claimed. If anything, it would indicate that his search was more general than he stated. Finally, Townsend's testimony as to the general search does not conflict with Schlatter's testimony that the operation became a "stake-out" after the suspect was not found. As I have said, a "stake-out" does not preclude a detailed search for evidence. And, the record indicates that Schlatter was not in the apartment when Townsend and the others conducted the detailed search.

The way I read the record, the photographs were discovered in the course of a general search for evidence. But even if Crowley is not believed and his testimony relating to the nature of his search is thrown out and it is simply assumed that he came upon the envelope in the course of a search for the suspect, there was no reason to pry into the envelope and seize the pictures—other than to obtain evidence. An envelope would contain neither the suspect nor the weapon.

SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1966.

Jesse James Gilbert, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of California.

[June 12, 1967.]

Mr. Justice Black, concurring in part and dissenting in part.

Petitioner was convicted of robbery and murder partially on the basis of handwriting samples he had given to the police while he was in custody without counsel and partially on evidence that he had been identified by eyewitnesses at a lineup identification ceremony held by California officers in a Los Angeles auditorium without notice to his counsel. The Court's opinion shows that the officers took Gilbert to the auditorium while he was a prisoner, formed a lineup of Gilbert and other persons, required each one to step forward, asked them certain questions, and required them to repeat certain phrases, while eyewitnesses to this and other crimes looked at them in efforts to identify them as the criminals. At his trial, Gilbert objected to the handwriting samples and to the identification testimony given by witnesses who saw him at the auditorium lineup on the ground that the admission of this evidence would violate his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. It is well-established now that the Fourteenth Amendment makes both the Self-incrimination Clause of the Fifth Amendment and the Right-to-counsel Clause of the Sixth Amendment obligatory on the States. See, *e. g.*, *Malloy* v. *Hogan*, 378 U. S. 1; *Gideon* v. *Wainwright*, 372 U. S. 355.

I.

(a) Relying on *Schmerber* v. *California*, 384 U. S. 757, the Court rejects Gilbert's Fifth Amendment contention as to both the handwriting exemplars and the lineup identification. I dissent from that holding. For reasons set out in *United States* v. *Wade*, *ante*, as well as for reasons set out in my dissent to *Schmerber*, 384 U. S., at 773, I think that case wholly unjustifiably detracts from the protection against compelled self-incrimination the Fifth Amendment was designed to afford. It rests on the ground that compelling a suspect to submit to or engage in conduct the sole purpose of which is to supply evidence against himself nonetheless does not compel him to be a witness against himself. Compelling a suspect or an accused to be "the source of real or physical evidence . . . ," so says *Schmerber*, 384 U. S., at 764, is not compelling him to be a witness against himself. Such an artificial distinction between things that are in reality the same is in my judgment wholly out of line with the liberal construction which should always be given to the Bill of Rights. See *Boyd* v. *United States*, 116 U. S. 616.

(b) The Court rejects Gilbert's right-to-counsel contention in connection with the handwriting exemplars on the ground that the taking of the exemplars "was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel." In all reality, however, it was one of the most "critical" stages of the government proceedings that ended in Gilbert's conviction. As to both the State's case and Gilbert's defense, the handwriting exemplars were just as important as the lineup and perhaps more so, for handwriting analysis, being, as the Court notes, "scientific and systematic," may carry much more weight with the jury than any kind of lineup identification. The Court, however, suggests that absence of counsel when handwriting exemplars

are obtained will not impair the right of cross-examination at trial. But just as nothing said in our previous opinions "links the right of counsel only to protection of Fifth Amendment rights," *United States* v. *Wade, ante,* at —, nothing has been said which justifies linking the right to counsel only to the protection of other Sixth Amendment rights. And there is nothing in the Constitution to justify considering the right to counsel as a second-class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy. The real basis for the Court's holding that the stage of obtaining handwriting exemplars is not "critical," is its statement that "there is minimal risk that the absence of counsel might derogate his right to a fair trial." The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel," *United States* v. *Wade, ante,* at —, and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial." But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him. The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer his trial will be "unfair." The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair, unless the court-created balancing formula has somehow changed it. *Johnson* v. *Zerbst,* 304 U. S. 458, and *Gideon* v. *Wainwright,* 372 U. S. 335, I thought finally established the right of an accused to counsel without balancing of any kind.

The Court's holding here illustrates the danger to Bill of Rights guaranties in the use of words like a "fair

trial" to take the place of the clearly specified safeguards of the Constitution. I think it far safer for constitutional rights for this Court to adhere to constitutional language like "the accused shall . . . have the Assistance of Counsel for his defence" instead of substituting the words not mentioned, "the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial." In my judgment the guaranties of the Constitution with its Bill of Rights provide the kind of "fair trial" the Framers sought to protect. Gilbert was entitled to have the "assistance of counsel" when he was forced to supply evidence for the Government to use against him at his trial. I would reverse the case for this reason also.

II.

I agree with the Court that Gilbert's case should not be reversed for state error in admitting the pretrial statement of an accomplice which referred to Gilbert. But instead of squarely rejecting petitioner's reliance on the dissent in *Della Paoli* v. *United States*, 352 U. S. 232, 246, the Court avoids the issue by pointing to the fact that the California Supreme Court, even assuming the error to be a federal constitutional one, applied a harmless-error test which measures up to the one we subsequently enunciated in *Chapman* v. *California*, 386 U. S. 18. And the Court then goes on to suggest that the California Supreme Court may desire to reconsider whether that is so upon remand.

I think the Court should clearly indicate that neither *Della Paoli* nor *Chapman* have any relevance here. *Della Paoli* rested on the admissibility of evidence in federal, not state, courts. The introduction of evidence in state courts is exclusively governed by state law unless its introduction would violate some federal constitutional provision and there is no such federal provision here. See *Spencer* v. *Texas*, 385 U. S. 554. That being so, any

error in admitting the accomplice's pretrial statement is only an error of state law, and *Chapman*, providing a federal constitutional harmless-error rule, has absolutely no relevance here. Instead of looking at the harmless-error test applied by the California Supreme Court in order to ascertain whether it comports with *Chapman*, I would make it clear that this Court is leaving to the States their unbridled power to control their own state courts in the absence of conflicting federal constitutional provisions.

III.

One witness who identified Gilbert at the guilt stage of his trial and eight witnesses who identified him at the penalty stage testified on direct examination that they had identified him in the auditorium lineup. I agree with the Court that the admission of this testimony was constitutional error and that Gilbert is entitled to a new trial unless the state courts, applying *Chapman*, conclude that this error was harmless. However, these witnesses also identified Gilbert in the courtroom and two other witnesses at the guilt stage identified him solely in the courtroom. As to these, the Court holds that "the admission of the in-court identification without first determining that they were not the fruit of the illegal lineup was constitutional error." I dissent from this holding in this case and in *Wade* v. *United States*, *post*, for the reasons there given.

For the reasons here stated, I would vacate the judgment of the California Supreme Court and remand for consideration of whether the admission of the handwriting exemplars and the out-of-court lineup identification was harmless error.*

*The Court dismisses as improvidently granted the Fourth Amendment search and seizure question raised by Gilbert in this case. I dissent from this, because I would decide that question against Gilbert. However, since the Court refuses to decide that question, I see no reason for expressing my views at length.

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SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1966.

Jesse James Gilbert, Petitioner, *v.* State of California.	On Writ of Certiorari to the Supreme Court of California.

[June 12, 1967.]

Mr. Justice White, whom Mr. Justice Harlan and Mr. Justice Stewart join, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but for the reasons stated in my dissenting opinion in *United States* v. *Wade*, — U. S. —, I dissent from Part IV of the Court's opinion and would therefore affirm the judgment of the Supreme Court of California.

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SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1966.

Jesse James Gilbert, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of California.

[June 12, 1967.]

Mr. Justice Fortas, with whom The Chief Justice joins, concurring in part and dissenting in part.

I concur in the result—the vacation of the judgment of the California Supreme Court and the remand of the case—but I do not believe that it is adequate. I would reverse and remand for a new trial on the additional ground that petitioner was entitled by the Sixth and Fourteenth Amendments to be advised that he had a right to counsel before and in connection with his response to the prosecutor's demand for a handwriting exemplar.

1. The giving of the handwriting exemplar is a "critical stage" of the proceeding, as my Brother Black states. It is a "critical stage" as much as is a lineup. See *United States* v. *Wade, ante.* Depending upon circumstances, both may be inoffensive to the Constitution, totally fair to the accused, and entirely reliable for the administration of justice. On the other hand, each may be constitutionally offensive, totally unfair to the accused, and prejudicial to the ascertainment of truth. An accused whose handwriting exemplar is sought needs counsel: Is he to write "Your money or your life?" Is he to emulate the holdup note by using red ink, brown paper, large letters, etc.? Is the demanded handwriting exemplar, in effect, an inculpation—a confession? Cf. the eloquent arguments as to the need for counsel, in the Court's opinion in *United States* v. *Wade, ante.*

2. The Court today appears to hold that an accused may be compelled to give a handwriting exemplar. Cf. *Schmerber* v. *California*, 384 U. S. 757 (1966). Presumably, he may be punished if he adamantly refuses. Unlike blood, handwriting cannot be extracted by a doctor from an accused's veins while the accused is subjected to physical restraint, which *Schmerber* permits. So presumably, on the basis of the Court's decision, trial courts may hold an accused in contempt and keep him in jail—indefinitely—until he gives a handwriting exemplar.

This decision goes beyond *Schmerber*. Here the accused, in the absence of any warning that he has a right to counsel, is compelled to cooperate, not merely to submit; to engage in a volitional act, not merely to suffer the inevitable consequences of arrest and state custody; to take affirmative action which may not merely identify him, but tie him directly to the crime. I dissented in *Schmerber*. For reasons stated in my dissent in *United States* v. *Wade*, *ante*, I regard the extension of *Schmerber* as impermissible.

In *Wade*, the accused, who is compelled to utter the words used by the criminal in the heat of his act, has at least the comfort of counsel—even if the Court denies that the accused may refuse to speak the words—because the compelled utterance occurs in the course of a lineup. In the present case, the Court deprives him of even this source of comfort and whatever protection counsel's ingenuity could provide in face of the Court's opinion. This is utterly insupportable, in my respectful opinion. This is not like fingerprinting, measuring, photographing—or even blood-taking. It is a process involving the use of discretion. It is capable of abuse. It is in the stream of inculpation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a "stacked" handwriting exemplar. The Court's reference to the efficacy of cross-examination

in this situation is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel.

3. I agree with the Court's condemnation of the lineup identifications here and the consequent in-court identifications, and I join in this part of its opinion. I would also reverse and remand for a new trial because of the use of the handwriting exemplar which was unconstitutionally obtained in the absence of advice to the accused as to the availability of counsel. I could not conclude that the violation of the privilege against self-incrimination implicit in the facts relating to the exemplar was waived in the absence of advice as to counsel. *In the Matter of Gault*, — U. S. —, — (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).